Petition

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No. 81-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

CHURCHILL AREA SCHOOL DISTRICT,
Petitioner,

v.

DOROTHY HOOTS, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

J. ROBERT MAXWELL, ESQ.
Maxwell & Huss
Farmers Bank Building
301 Fifth Avenue
Pittsburgh, Pennsylvania 15222
(412) 281-1658
Attorney for Petitioner Churchill Area School District

PHILIP B. KURLAND
Two First National Plaza
Chicago, Illinois 60603
(312) 372-2345
Of Counsel

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QUESTIONS PRESENTED

1. Does a difference in racial mix in the student bodies of adjacent independent school districts constitute a violation of the Equal Protection Clause?

2. Is there a violation of the Equal Protection Clause when there is no substantial evidence of discriminatory intent to segregate on the part of the State?

3. May a district court impose a consolidation of independent school districts on a school district that played no part in the cause or effect of the alleged constitutional violation?

4. May a district court base its finding of liability for intentional discrimination on evidence which petitioner had no opportunity to cross-examine or rebut because it was not a party to the liability proceeding?

PARTIES BELOW

DOROTHY HOOTS, individually and as mother of her children JANELLE HOOTS and JAMIE HOOTS; MRS. ADDRALLACE KNIGHT, individually and as mother and natural guardian of her children RONALD KNIGHT, LORETTA KNIGHT, TERRANCE KNIGHT, MARC KNIGHT and BYRON KNIGHT; BARBARA SMITH, individually and as mother and natural guardian of her children TAWANDA SMITH, TEVELA SMITH, JOSEPH SMITH, WESLEY SMITH and ERIC SMITH;

on behalf of black children and their parents residing in the General Braddock School District; GENERAL BRADDOCK SCHOOL DISTRICT;

Appellees;

COMMONWEALTH OF PENNSYLVANIA; PENNSYLVANIA STATE BOARD OF EDUCATION and its Chairman, W. DEMING LEWIS; ALLEGHENY INTERMEDIATE BOARD OF SCHOOL DIRECTORS, and its President, EDWARD X. HALLENBERG; CHURCHILL AREA SCHOOL DISTRICT, EDGEWOOD SCHOOL DISTRICT, SWISSVALE AREA SCHOOL DISTRICT, TURTLE CREEK AREA SCHOOL DISTRICT,

Appellants.

All school districts referred to above are located in Allegheny County, Pennsylvania.

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CHURCHILL AREA SCHOOL DISTRICT,

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DOROTHY HOOTS, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner respectfully requests that a writ of certiorari issue from this Court to review the judgment of the United States Court of Appeals for the Third Circuit in the above-encaptioned cause.

OPINIONS BELOW

The judgment and opinion of the Court of Appeals are not yet reported. They are set forth in full as Appendix A herein. Four opinions of the United States District Court for the Western District of Pennsylvania are relevant to this Petition, they being the opinion denying motions to dismiss reported as *Hoots* v. *Commonwealth*, 334 F. Supp. 820 (W. D. Pa. 1971), the opinion on liability reported as *Hoots* v. *Commonwealth*, 359 F. Supp. 807 (W. D. Pa. 1973), the opinion as to the school districts eligible for inclusion in the remedy reported as *Hoots* v.

Commonwealth, 510 F. Supp. 615 (W. D. Pa. 1981), and the opinion and judgment consolidating school districts which are not yet reported. Those opinions are set forth in full as Appendices B-1, B-2, B-3 and B-4 herein. Also relevant is an earlier opinion of the Court of Appeals reported as *Hoots* v. *Commonwealth*, 495 F. 2d 1095 (3d Cir. 1974), cert. denied 419 U. S. 884 (1975). It is set forth in full as Appendix C. Other opinions of the courts below in this case are listed in footnote 1 of the opinion of the Court of Appeals (A 9). These opinions are voluminous, pertain to matters collateral to this Petition and are therefore not included in the Appendices.

JURISDICTION

The judgment and opinion of the Court of Appeals were entered on February 1, 1982. There was no petition for rehearing filed. Jurisdiction is asserted here under 28 U. S. C. § 1254(1). Jurisdiction in the Court of Appeals was asserted under 28 U. S. C. § 1291. Jurisdiction in the trial court was asserted under 28 U. S. C. § 1343(3) and (4), and the court also found jurisdiction to exist under 28 U. S. C. §§ 1331(a), 2201 and 2202, and 42 U. S. C. §§ 1983 and 1988.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Fourteenth Amendment, Section 1:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Rule 19(a), Federal Rules of Civil Procedure

24 P. S. § 2-281, *et seq.* (Act 561)

24 P. S. § 2-290, *et seq.* (Act 299)

24 P. S. § 2-2400.1, *et seq.* (Act 150)

Standards for Reorganization Under Act 299

Standards for Reorganization Under Act 150

The texts of Rule 19(a), Federal Rules of Civil Procedure, relevant Pennsylvania statutes, and the Standards for Reorganization of school districts are set forth in Appendix D.

STATEMENT OF THE CASE

This case arises out of the efforts of the Commonwealth of Pennsylvania to reorganize its school districts into more efficient units by the joinder or consolidation of small independent districts into larger ones. The Commonwealth's program for compulsory consolidation began in 1961. There was then and there is now no history in Pennsylvania of any *de jure* segregation. Since 1881 Pennsylvania has by statute prohibited school directors, superintendents and teachers from making any distinctions whatever on account of the race or color of any student attending or seeking admission to any pupil school. (24 P. S. § 13-1301)

Each municipality in Pennsylvania had constituted a separate school district until the amendment of the Public School Code in 1949. At that time, the legislature granted permission for voluntary consolidation of school districts, but such districts required the approval of the county and the State before becoming effective. (24 P. S. §§ 17-1701, *et seq.*; 24 P. S. §§ 2-251, *et seq.*) Between 1949 and 1961, efforts were made to encourage school districts voluntarily to consolidate. (*State Board* v. *Franklin Township School District*, 209 Pa. Super. 410, 228 A. 2d 221, 223 (Super. Ct. Pa. 1967).) Financial inducements were offered. The Superintendent of Schools of Allegheny County—the county in which all the school districts

involved in this case are located—encouraged such voluntary consolidations. (303a-304a.)[1] Some municipal school districts, including the districts included in Petitioner, Churchill Area School District, agreed to consolidation under the urging of the County Superintendent. The joinder of Forest Hills, Chalfont and Wilkins Township-Churchill municipal school districts had been approved by the State Council of Education in 1957. (447a.) These districts voluntarily consolidated and the resultant district, Churchill, was in operation as a joint school district by 1960. Churchill was again approved by the State Council in May, 1961.

Over all the voluntary consolidation program did not substantially reduce the number of independent municipal school districts in Pennsylvania. There remained over 2,000 independent districts when, in 1961, Pennsylvania adopted legislation mandating consolidation. The first mandatory school district consolidation law, Act 561, required that school districts contain—with some exceptions that reduced the minimum to 2,500 students—at least 4,000 students. (Act 561, 24 P. S. § 2-281 *et seq.*) Existing consolidation agreements were to be honored under this Act, but consolidated districts could be joined with others to form still larger districts. Act 561 required county school boards to submit consolidation plans to the State School Board by January 1, 1963. If approved, the new districts were to be deemed established on July 1, 1965.

By the time the Allegheny County School Board developed its consolidation plan under Act 561, Churchill had well over the minimum 4,000 pupils. (418a.) Moreover, referenda approving Churchill as a "union" district had been completed in 1962 and Churchill had been certified as Churchill Union School District on July 2, 1962 (1506a). Thus Churchill was not slated for consolidation with any other district, and the

[1] "a" references are to the five-volume Appendix filed in the Court of Appeals.

County School Board proposed that Churchill become Unit 13 in the Allegheny County reorganization plan developed under Act 561. (447a, 475a.)

Act 561 became the subject of great public controversy, however (see *State Board* v. *Franklin Township*, 228 A. 2d at 224), and no consolidated school district was deemed established under Act 561 before that law was superseded in 1963 by Act 299. (Act 299, P. S. §§ 2-290 *et seq.*)

Act 299 was similar to Act 561, but made two significant modifications. The absolute minimum of 2,500 pupils per district was eliminated, and an administrative appeals procedure was established. Act 299 required County School Boards to develop and submit consolidation plans by July 1, 1964. Approved units would be deemed established on July 1, 1966. Under Act 299, the County Board proposed the same plan for the Churchill unit as it had proposed under Act 561. (475a.) The County Board plan for Churchill was approved by the Council of Basic Education on September 9, 1964 (518a) and Churchill automatically became established as a school district unit on July 1, 1966.

Not all school districts were approved and established under Act 299 by July 1, 1966. The Dauphin County Court became "flooded" with over 100 appeals from throughout the state. *State Board* v. *Franklin Township*, 228 A. 2d at 221, n.1. In Allegheny County the County Board originally proposed 38 administrative units under Act 299, and the State Board expanded the number to 46. Of these, 34 including Churchill were deemed established as school districts under Act 299. The other 12 raised appeals which were still unresolved when Act 299 was superseded by Act 150 in 1968. (550a.)

Act 150 provided for future consolidations of those school districts that had not yet been consolidated. (Act 150, 24 P. S. § 2400.1.) Churchill was not eligible for reorganization under Act 150 because it had been reorganized under Act 299.

Therefore none of the proceedings for reorganizations under Act 150 included Churchill. As the District Court found on November 18, 1977 (840a-841a):

> Churchill is a union school district, created by a referendum of the concerned districts and approved as such by the then State Council on Education on May 29, 1957, and May 17, 1961. It was so considered by the Allegheny County Board plan submitted under Act 299. Therefore, by the terms of Act 150 it was not subject to further reorganization under that Act in 1968. Of more importance in the present case is the fact that Churchill's present boundaries were not created by any actions under Act 150 after 1968 when the alignment of consolidated school districts came into being resulting in the creation of the General Braddock Area School District as a segregated district. Thus no evidence exists of a deliberate, purposeful segregative intent in the creation of the Churchill district that would subject it to an interdistrict remedy to achieve racial balance.

This suit was filed in 1971, charging discrimination in the formation of the General Braddock School District which became effective that year. General Braddock was a consolidation pursuant to Act 150 of the three districts of Braddock, North Braddock, and Rankin. There was neither allegation nor proof that any of these three districts were racially segregated either prior to or after the merger. The essence of the complaint was, rather, that there was a racial disparity between General Braddock and neighboring districts, that this racial disparity could have been diminished had the State approved or commanded a different consolidation, and that the failure to effect a consolidation with less racial disparity constituted a violation of the Fourteenth Amendment's Equal Protection Clause.

The history of the consolidation of General Braddock which the courts below treated as violative of the Constitution may be briefly stated. It is to be noted that Churchill played no role whatsoever in this history.

A plan for the voluntary consolidation of the municipal districts of Braddock, North Braddock, Rankin, East Pittsburgh and Braddock Hills was suggested by the County School Superintendent and approved by the State Council in 1958. (447a-448a.) However, the municipal school districts themselves made no effort voluntarily to join or to merge in accordance with this plan. Under the first mandatory consolidation law, the County Board proposed that these same five municipal districts be organized as Unit 14. Some of the districts objected. (41?a, 447a-448a.) Had East Pittsburgh and Braddock Hills been included in what became the General Braddock district, the proportion of blacks would have been smaller than it came to be. Under Act 299, the County Board then substituted Turtle Creek for Braddock Hills and proposed this joinder to be organized as Unit 16. (476a.) Again, the unit would have contained a smaller proportion of black students than resulted in General Braddock. There were further objections. (582a.) The Council of Basic Education approved the County Board's plan, but the State Board put Turtle Creek and East Pittsburgh in a separate Unit 42. (544a.) Thus, Braddock, North Braddock, and Rankin remained as Unit 16. (517a.) Because appeals were taken, however, these units did not become operative before Act 299 was superseded by Act 150. Under Act 150, the County Board again proposed and the State Board approved Braddock, North Braddock, and Rankin as Unit 16. (316a, 558a.) All three of the school districts proposed to be joined in Unit 16 appealed to the courts. Braddock and North Braddock wanted to remain independent units, which would have left Braddock with a greater proportion of blacks than eventuated in General Braddock. Rankin wanted to join Swissvale. The Court of Common Pleas reviewed the contentions of all three districts and affirmed the General Braddock District as formed. *In re Appeal of School District of the Borough of Rankin, et al.*, Nos. SA 544, 556 and 559 of 1969, in the Court of Common Pleas of Allegheny County, Pa. A copy of this opinion is set forth in full in

Appendix E herein. It was this school district that was challenged in this case. When proposed as Unit 16 by the County and State Boards, General Braddock was approximately 40% black.[2] The Court of Appeals' statement that General Braddock was 63% black on July 1, 1971 (A 12) is incorrect; that was the district's approximate black student population in 1981. (3233a)

Petitioning school districts, now attached to General Braddock, were never made parties to the litigation prior to the remedial phase of the case. During the liability phase of the case, the trial court denied motions by the Commonwealth and other defendants to join these districts and General Braddock as parties defendants pursuant to Rule 19 or to add them as parties pursuant to Rule 21. The school districts did not voluntarily seek to intervene, although urged to do so by the Commonwealth. (614a-618a.) Churchill did not contact the court in response to the Attorney General's letter urging intervention.[3]

After the ruling in favor of plaintiffs on liability, Churchill and Turtle Creek Area School District sought to intervene in order to take an appeal. The trial court denied these petitions. Churchill and Turtle Creek then appealed the denials and the district court's judgment on liability. The Commonwealth and the other defendants did not appeal at this time, but proceeded to the remedial phase of the case. While the appeals were pending Churchill and other districts filed new petitions to intervene. The trial court permitted intervention, but only for

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[2] 38.7% based on 1967 figures and 44.9% based on 1971 figures. (331a-337a.) The county and state plans were adopted in 1968 and 1969, respectively.

[3] Paragraph 9 in the Court of Appeal's opinion (A 13) refers to "the districts" having informed the court of their disinterest in the lawsuit. The words quoted by the Court of Appeals are actually the trial court's words, commenting on a phone call from an unidentified solicitor.

the limited purpose of presenting argument on the Commonwealth's remedial plans. It refused to permit the districts to intervene as defendants generally to introduce evidence or make arguments on liability. Churchill and Turtle Creek appealed these refusals as well, and these appeals were consolidated with the earlier ones. The Court of Appeals then ruled that the petitions to intervene were not timely filed, and dismissed the appeals. It refused to consider whether Churchill and the other districts were indispensable parties under Rule 19, because the districts, being "non-parties" had no standing to appeal and raise the issue. *Hoots* v. *Commonwealth,* 495 F. 2d 1095, cert. denied 419 U. S. 884 (A 116-121). Churchill participated in the lower court proceedings as "limited intervenor" until, in May 1979, the trial court ordered that the school districts be made parties defendant solely for the remedial phases of the case. The court's order specifically prohibited the school districts from relitigating the violation previously found by the court. (853a.)

After ten years of litigation below, during which numerous remedial plans were rejected, the trial court entered an order to consolidate the General Braddock district, with Churchill, Edgewood, Swissvale and Turtle Creek, all of which are or will be petitioners here. *Hoots* v. *Commonwealth,* unreported decision of April 28, 1981 (A 102-115). Never in the proceedings for consolidation before the administrative agencies or courts of Pennsylvania was any such district considered as a possibility.

The Court of Appeals affirmed the District Court's action in all respects.

REASONS FOR GRANTING THE WRIT

I.

THE CASE IS OF EXTRAORDINARY IMPORTANCE BECAUSE IT CREATES NEW CONSTITUTIONAL DOCTRINE FOR DESEGREGATION CASES IN CONFLICT WITH THE RULINGS OF THIS COURT.

The decision below establishes an entirely new predicate for federal court assumption of local government authority, without support in this Court's decisions and in direct conflict with them. The courts below have established three novel rules of law that find no warrant in this Court's reading of the Constitution. *First,* that a disparity in racial makeup between or among independent school districts constitutes a violation of the Equal Protection Clause of the Fourteenth Amendment. *Second,* that a State has an affirmative duty to reduce racial disparities between or among independent school districts. *Third,* that a federal district court may reorganize a State's independent school districts by dictating their combination solely at its own discretion, without regard to cause, fault, or effect of the alleged constitutional violation.

It is exactly this kind of grasp for power that has brought about the burgeoning constitutional crisis over the appropriate roles of Congress, the states, and the federal judiciary. If the lower courts are to be affirmed here in their asserted hegemony over state school systems, it is, at least, incumbent on this Court to set forth reasons why such expansive judicial power is constitutionally justified.

II.

THE RULING BELOW THAT THE DISPARATE RACIAL MAKEUP OF NEIGHBORING SCHOOL DISTRICTS CONSTITUTES A VIOLATION OF THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT IS IN DIRECT CONFLICT WITH THE RULINGS OF THIS COURT.

There is no racial school segregation involved in this case. The charge here is not that the defendant school boards operated segregated schools. The sole charge of constitutional violation is that one of the school districts reorganized for purposes of economy of administration has a higher proportion of minority students than do adjacent reorganized districts. Under the decisions of this Court, this is not a constitutional violation. Furthermore, the racial disparity is actually smaller in the reorganized districts than it was prior to reorganization.[4]

In *Wright* v. *Council of City of Emporia,* 407 U. S. 451, 464 (1972), this Court said: "We need not and do not hold that the disparity in the racial composition of the two systems would be sufficient reason, standing alone, to enjoin the creation of the separate school districts." And again, *id.* at 470: "As already noted, our holding today does not rest upon a conclusion that the disparity between the city and county schools resulting from separate systems would, absent other considerations, be unacceptable." The reason why the creation of separate districts with disparate racial makeups was invalidated in *Emporia* was that it would undo a desegregation program that was required to cure *de jure* segregation. There are no such prior desegregation orders in this case. This case falls rather within the ruling in *Spencer* v. *Kugler,* 326 F. Supp. 1235 (D. N. J. 1971), *aff'd,*

[4] As formed, General Braddock's student population was approximately 40% black. The racial composition of its component municipal districts in 1967, the year prior to General Braddock's being reorganized under Act 150, was Braddock (63.4%), North Braddock (19.6%) and Rankin (51.3%) (331a-335a).

404 U. S. 1027 (1972), that there is no constitutional duty to redistrict school systems to equalize the racial mix between or among school districts. This conclusion was again approved by this Court even where the disparately composed districts were located in *de jure* segregation States under a duty to eliminate all vestiges of the dual school systems that they once maintained. *Armour* v. *Nix*, Civil No. 16708 (N. D. Ga. 1979), *aff'd*, 446 U. S. 930 (1980); see also *School Board of Richmond* v. *State Board of Education*, 462 F. 2d 1058 (4th Cir. 1972), *aff'd* by equally divided Court, 412 U. S. 92 (1973).

In short, there is neither a school segregation violation charged nor one proved on this record. In the absence of a violation, there is no need to look to the questions whether there was an intentional act of segregation or whether the interdistrict remedy afforded was appropriate to the cure of a nonexistent violation.

III.

THIS COURT'S DECISIONS MAKE IT CLEAR THAT IF THERE WERE A VIOLATION, THE EVIDENCE THAT THE VIOLATION WAS AN INTENTIONAL ONE IS INSUFFICIENT.

What we have here is not a school desegregation case but a charge of racial gerrymandering of school districts. And the plaintiffs are not entitled to prevail here for the same reasons that the plaintiffs could not prevail in *Wright* v. *Rockefeller*, 376 U. S. 52 (1964). As this Court said in *Washington* v. *Davis*, 426 U. S. 229, at 240 (1976):

> The rule is the same in other contexts. *Wright* v. *Rockefeller*, 376 U. S. 52 (1964), upheld a New York congressional apportionment statute against claims that district lines had been racially gerrymandered. *The challenged districts were made up predominantly of whites or of minority races, and their boundaries were irregularly drawn.* The challengers did not prevail because they failed to

> prove that the New York Legislature "was either motivated by racial considerations or in fact drew the districts on racial lines"; the plaintiffs had not shown that the statute "was the product of a state contrivance to segregate on the basis of race or place of origin." *Id.* at 56, 58. The dissenters were in agreement that the issue was whether the "boundaries ... were purposefully drawn on racial lines." *Id.* at 67. (Emphasis added.)

And, as stated in *Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U. S. 252 (1977): "Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause." *Id.* at 265. See also *Personnel Administrator of Mass.* v. *Feeney*, 442 U. S. 256 (1979); *Mobile* v. *Bolden*, 446 U. S. 55 (1980). The same requirement of racial motivation would be applicable if this were in fact a school desegregation case. *Keyes* v. *School District No. 1*, 413 U. S. 189 (1973).

No case of racial motivation was made out here. The court below could cite only the sparsest evidence. None of this was evidence of discriminatory intent. All of it was statements by witnesses expressing their own biases or their opinions that the responsible agencies (i.e., the County and State Boards) *might* have relied on racial or other socioeconomic factors. There was no adequate proof that the Boards had actually taken race into consideration. The courts below merely inferred that from the effect. Nor does the record substantiate several pieces of the meager evidence cited by the court.[8]

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[8] For example, Item (2), paragraph 31 (A 24), Mr. Suley testified to his and his community's attitudes, and petitions, but did not testify that he and school board colleagues had pressured any State or County Board member; Item (5), paragraph 31 (A 26), refers to a brief filed by a white district that wanted to join Churchill in order to avoid a proposed consolidation with General Braddock's components, does not attribute political pressure to Churchill and makes no reference to merger of Churchill with any other neighbors (588a); Item (9), paragraph 31 (A 26), Dr. Finger's bottom line conclusion was that he could *not* prove racial motivation from the evidence (238a).

The Court of Appeals chose to ignore the most cogent evidence that there was no element of racial gerrymandering in the Boards' actions. The trial court held that it was not the utilization of racial measures that constituted the violation, but rather that it was the refusal of the State and County Boards to invoke race as a basis for classification that constituted the violation. *Hoots* v. *Commonwealth*, 359 F. Supp. at 823 (Conclusion 9.) (A 81) This, indeed, creates a new canon: if the Boards used race as a basis for classification, they violated the Constitution; if the Boards did not use race as a basis for classification they violated the Constitution. Hobson's choice. It is evident from the record that the defendant Boards refused to invoke any racial standards as the bases for their actions. *Id.* at 812. (A 56) There was a stipulation by the parties that both the State and County Boards would offer testimony that, in preparing and approving the plan under Act 150, they did not consider the racial characteristics of any communities affected by the plan because they construed their mandate as prohibiting considerations of race. (652a-656a.) Paragraph 7 of the Standards for Approval of Administrative Units under Act 150 (319a-321a) specifically provided: "Neither race or (sic) religion shall be a factor in determining administrative unit boundaries and differences in the social and economic level of the population shall not be a basis to determine these boundaries." The Standards adopted under Acts 299 and 150 are set forth in Appendix D (A 135-147).

The court also chose to ignore that the organization of General Braddock had been thoroughly scrutinized by a state court. Rankin, North Braddock and Braddock, the three elements of General Braddock, each appealed from their consolidation into a single district. None suggested that the new district was constitutionally defective for reasons of racial discrimination. Each had other, non-racial reasons for not wanting to be joined with the others. See the opinion of Judge McKenna, set out in Appendix E (A 148-173)

Unless this Court is prepared to reject the principle that it has long since established—and to which it has continued to adhere, see, *e.g.*, *Memphis* v. *Green*, 451 U. S. 100 (1981)—that there must be adequate proof of racially motivated state action to constitute a violation of the Equal Protection Clause, the judgment below is patently erroneous. If this Court is prepared to abandon its principles on this subject, it ought to say so in a judgment in this case in order to elucidate the rules under which the lower courts must operate. As a result of the decision below there will certainly be a large number of cases based solely on racial disparity between or among adjacent independent school districts brought in the federal courts with reliance on the inference from the disparity that there was segregative intent.

IV.

EVEN IF THERE WERE A VIOLATION OF THE EQUAL PROTECTION CLAUSE, AND EVEN IF THAT VIOLATION WERE PROPERLY DEEMED TO BE INTENTIONAL SEGREGATORY ACTION, THERE IS STILL NO JUSTIFICATION, UNDER THE RULINGS OF THIS COURT, FOR AN INTERDISTRICT REMEDY INCORPORATING CHURCHILL IN THE COURT-DEVISED REORGANIZATION OF THESE PENNSYLVANIA SCHOOL DISTRICTS.

The trial court, as we have already noted, established the reasons why Churchill should not be included in any interdistrict remedy that it might devise to reduce the black-white ratio in General Braddock (840a-841a):

> Churchill is a union school district, created by a referendum of the concerned districts and approved as such by the then State Council on Education on May 28, 1957, and May 17, 1961. It was so considered by the Allegheny County Board plan submitted under Act 299. Therefore, by the terms of Act 150 it was not subject to further reorganization under the Act of 1968. Of more

> importance in the present case is the fact that Churchill's present boundaries were not created by any actions under Act 150 after 1968 when the alignment of consolidated school districts came into being resulting in the creation of the General Braddock Area School District as a segregated district. Thus no evidence exists of a deliberate, purposeful segregative intent in the creation of the Churchill district that would subject it to an interdistrict remedy to achieve racial balance.

As the Court of Appeals for the Third Circuit once noted in reliance on the judgments of this Court, in *Evans* v. *Buchanan*, 582 F. 2d 750, 757-58 (3d Cir. 1978), quoting its own earlier opinion in the same case, 555 F. 2d at 379-80:

> A court is not at liberty to issue orders merely because it believes that they will produce a result which the court finds desirable. The existence of a constitutional violation does not authorize a court to seek to bring about conditions that never would have existed even if there had been no constitutional violation. The remedy for a constitutional violation may not be designed to eliminate arguably undesirable states of affairs caused by purely private conduct (*de facto* segregation) or by state conduct which has in it no element of racial discrimination. [Citing *Milliken, Spencer* v. *Kugler, Arlington Heights,* all *supra.*] Nor may a remedial desegregation order require "as a matter of substantive constitutional right, any particular degree of racial balance or mixture." [Citing *Swann* v. *Board of Education,* 402 U. S. 1, 24 (1972), and *Milliken, supra.*] ...
>
> The task of a remedial decree in a school desegregation case is simply to correct the constitutional violation and to eradicate its effects. "As with any equity case, the nature of the violation determines the scope of the remedy." [Citing *Swann, supra.*]

> The power of federal courts to restructure the operation of local and state governmental entities 'is not plenary. It "may be exercised 'only on the basis of a constitutional violation.' " [Citing *Milliken*, quoting *Swann*, both *supra*, and *Rizzo* v. *Goode*, 423 U. S. 362, 377 (1967).] Once a constitutional violation is found, a federal court is required to tailor "the scope of the remedy" to fit "the nature and extent of the constitutional violation." . . .

The Third Circuit followed none of these self-avowed requirements in this case. If there were any constitutional violation here it was in the drawing of the boundaries of General Braddock in such a way as to allow a disparate number of blacks, compared to other districts, to remain in the school district. At the time of the drawing of the General Braddock district, Churchill was not subject to further consolidation by reason of Act 150, the constitutionality of which is unchallenged.

To avoid this barrier to its intended remedy, and even though the Amended Complaint alleged that General Braddock was formed as a result of violations occurring under Act 150, the District Court found that the violation which produced General Braddock occurred in a continuum under Acts 561, 299 and 150. The court reached this conclusion on the grounds that, because of actions taken under Acts 561 and 299, the County and State Boards had no options under Act 150 except to merge Braddock, North Braddock and Rankin. *Hoots* v. *Commonwealth*, 510 F. Supp. at 621. (A 97) That is totally unsupported in the record. To the contrary, every school district which was ever considered for inclusion with Braddock, North Braddock and Rankin—Churchill was never one of them—was still available as a merger partner under Act 150. Swissvale, Braddock Hills, Turtle Creek, East Pittsburgh and Edgewood were all available under Act 150. These districts

1973 decision on liability that there were acceptable alternatives available when General Braddock was formed under Act 150, none of which included Churchill. Findings of Fact 42-44, 53-55. *Hoots* v. *Commonwealth*, 359 F. Supp. at 817, 820 (A 67-69, 74).

A diminution in the racial disproportion in General Braddock could have been accomplished under Act 150 by the inclusion of any one or more of these districts. The point is that Churchill was not part of the violation; it could not have been joined under state law with General Braddock. It was exempted not for any racial reason but because local governments were exempted from repeated reorganizations in order to permit them to perform their functions as educational institutions. Churchill had been reorganized in what the district court itself denominated a perfectly constitutional manner. If it was not part of the violation, it should not be made part of the remedy, which is required "to fit 'the nature and extent of the constitutional violation,' " *Dayton, supra;* "a constitutional violation does not authorize a court to bring about conditions that never would have existed even if there had been no constitutional violation," *Evans* v. *Buchanan, supra.*

There is an additional reason why the remedy imposed here on Churchill is invalid. The mere disparity of racial compositions between Churchill and General Braddock does not justify an interdistrict remedy even in jurisdictions charged with the elimination of *de jure* segregation dating back to the aftermath of the Civil War. *Armour* v. *Nix, supra.* The standard for an interdistrict remedy was established by this Court in *Milliken* v. *Bradley*, 418 U. S. 717, 744-745 (1974):

> The controlling principle consistently expounded by our holdings is that the scope of the remedy is determined by the nature and extent of the constitutional violation. *Swann*, 402 U.S., at 16. Before the boundaries of separate and autonomous school districts may be set aside by consolidating the separate units for remedial purposes or by imposing a cross-district remedy, it must first be shown

district that produces a significant segregative effect in another district. Specifically, it must be shown that racially discriminatory acts of the state or local school districts, or of a single school district have been a substantial cause of inter-district segregation.

There is a total absence of evidence showing that the formation of Churchill had any segregatory effects in General Braddock or that the formation of General Braddock had any segregatory effects in Churchill. Plaintiffs' evidence during the violation phase of the case established conclusively that Churchill was neither involved in nor affected by the establishment of General Braddock. Plaintiffs' witnesses testified as to alternatives which would have involved General Braddock's components with Turtle Creek, East Pittsburgh, Braddock Hills and Swissvale. (172a, 225a) A witness compared statistics on the black-white populations and the education levels in communities adjoining General Braddock, and referred specifically to Turtle Creek, East Pittsburgh, Braddock Hills, Swissvale and Edgewood. (255a-256a, 263a) Another witness testified about discrimination in the sale of housing in communities near General Braddock, mentioning Swissvale, East Pittsburgh, Turtle Creek, Wilmerding, East McKeesport and North Versailles. (243a, 281-290a) Churchill was never mentioned in any of the testimony. Not one of the plaintiffs' liability witnesses, including their experts, mentioned Churchill as a prospect for consolidation with Braddock, North Braddock or Rankin.

It was not until the remedial phase of the case that Plaintiffs produced "experts" who would have included Churchill in a consolidated district. But, like the court, the experts are not permitted to "bring about conditions that never would have existed even if there had been no constitutional violation". *Evans* v. *Buchanan*, 582 F. 2d at 757. The question is not what educational theorists would like to do if given a free hand to restructure school districts, the question is what the conditions would have been but for the alleged constitutional violation. In

that regard the evidence is clear. Nothing in the history of the Boards' activities from 1962 forward showed the slightest indication that Churchill's lines would have been drawn differently, for any reason, with or without the alleged constitutional violations of others. The only experts who testified as to "what might have been" in the absence of alleged constitutional violations were the Plaintiffs' experts who testified at the liability hearing in December, 1972. They reviewed the records of the Boards' proceedings during the '60s and testified as to the alternatives which the Boards passed up. Not one of them mentioned Churchill as a prospect for consolidation with Braddock, North Braddock or Rankin. The trial court did not find otherwise. Rather it found that Churchill could be included in the remedy because the County and State Boards had *not* considered it for merger with General Braddock.

This Court explicated *Milliken* in *Hills* v. *Gautreaux*, 425 U. S. 284 (1976). It explained that, although *Milliken* discussed the many practical problems that would be encountered in the consolidation of numerous school districts, the Court's decision rejecting the metropolitan area desegregation order "was actually based on fundamental limitations on the remedial powers of the federal courts". *Id.* at 239. The Court approved a metropolitan area remedy in *Gautreaux* because such a remedy "need not displace the rights and powers accorded suburban governmental entities", *Id.* at 299 (fn. 13), or "consolidate or in any way restructure local governmental units", *Id.* at 305-306. By contrast, the *Milliken* remedy was deemed impermissible because "it contemplated a judicial decree restructuring the operation of local governmental entities that were not implicated in any constitutional violation". *Id.* at 296. Churchill was not implicated in any constitutional violation, yet the trial court abolished it. Once again the decision of the lower courts relating to Churchill can be seen to be totally at odds with the rulings of this Court.

V.

THE FAILURE TO AFFORD THE SCHOOL DISTRICTS SUBJECT TO THE REMEDIAL ORDER A HEARING ON THE NATURE AND EXTENT OF THE ALLEGED VIOLATIONS WAS IN CONFLICT WITH THIS COURT'S RULING IN MILLIKEN v. BRADLEY.

Rule 19(a) of the Federal Rules of Civil Procedure provides that a person who is subject to service of process, and whose joinder will not deprive the court of jurisdiction, shall be joined as a party if he claims an interest relating to the subject matter of the action and is so situated that the disposition of the action in his absence may as a practical matter impair or impede his ability to protect that interest. None of the school districts affected by the trial court's remedial order were defendants during the violation phase of the case. In response to Motions by the Commonwealth, and the State and County Boards, the trial court ruled that the districts were not required to be joined as defendants. (55a-61a; 958a-963a.)

In the appeal to which this Petition for Writ of Certiorari relates the Commonwealth and the State Board, as well as Churchill and other school districts, raised the issue whether the school districts were indispensable parties for the liability phase of this case. The Commonwealth candidly acknowledged in its Brief:

> Neither the Commonwealth defendants nor the county defendants had any interest, at trial, or in March of 1981, in establishing the "innocence" of the school districts surrounding General Braddock or the degree of their involvement in the creation of General Braddock. Only the school districts were in a position to dispute their involvement in any Fourteenth Amendment violation. Thus, those complex issues were decided without any real adversarial proceedings.

The Commonwealth and the State and County Boards called no witnesses and introduced only two documents during the two-day hearing on liability. The Court of Appeals rejected

these arguments. It concluded that the school districts had been afforded a "meaningful opportunity" to be heard. And the court said, "to the extent that the defendant school districts were precluded . . . from arguing the question of whether there was intentional racial discrimination, we adhere to our earlier holding that the school districts' post-1973 intervention motions were untimely. . . ." (A 29).

The trial court's decision that the school districts were not indispensable parties conflicts squarely with the principles announced by this Court in *Milliken* v. *Bradley*, 418 U. S. 717 (1974). The trial court reasoned that, since the power to draw school district boundaries rests solely with the Commonwealth and the State Board, the surrounding school districts had "no legal right to have their existing boundaries maintained and consequently . . . no legal interest . . . which can be affected by the outcome of the litigation". *Hoots* v. *Commonwealth*, 359 F. Supp. at 821 (A 76-77). The relationship of school districts to the state is essentially the same in Pennsylvania as it is in Michigan—school districts are instrumentalities of the state and subordinate to the State Board of Education and the legislature, the state is charged with providing a system of public education and the school districts are not part of the local self-government except as the legislature might choose to make them so. Yet this Court said in *Milliken* v. *Bradley:*

> ". . . the notion that school district lines may be casually ignored or treated as a mere administrative convenience is contrary to the history of public education in our country. No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process . . . local control over the educational process affords citizens an opportunity to participate in decision-making, permits the structuring of school programs to fit local needs, and encourages 'experimentation, innovation, and a healthy competition for educational excellence.'

> "The Michigan educational structure involved in this case, in common with most States, provides for a large measure of local control and a review of the scope and character of these local powers indicates the extent to which the interdistrict remedy approved by the two courts could disrupt and alter the structure of public education. . . ."

supra, at 741-42.

Because the record showed no interdistrict violation, this Court was not required to decide in *Milliken* whether the suburban school districts had been denied due process by the manner in which their participation was limited. That question should now be addressed.

This is not a case where the issue of necessary or indispensable parties first arises on appeal. The original defendants repeatedly urged the trial court to add the school districts as defendants. Thus *Provident Bank & Trust Co.* v. *Patterson,* 390 U. S. 102 (1968), is not controlling. And this is not a case such as *Hills* v. *Gautreaux, supra,* where the remedy affects a non-party but does not abrogate that non-party's role as a local governmental unit. In this case the trial court ordered that Churchill and other districts "shall cease to exist as separate school districts." (A 111)

Nor should the districts be estopped because they could have intervened prior to the hearing on liability. Fundamental due process would seem to require that independent units of government which may be affected in this drastic manner should be sued; they should not have to volunteer themselves as defendants. The Commonwealth made it clear to the trial court and the plaintiffs that it was not representing the districts' interests. The Commonwealth's counsel also pointed out that "prudent lawyering" by the districts' solicitors dictated that their clients not intervene. (59a.) Yet neither the trial court nor the plaintiffs saw fit to join the districts as defendants, even though joinder would not deprive the court of jurisdiction nor render venue improper.

Estoppel is particularly inappropriate in Churchill's case. The Amended Complaint charged, *inter alia*, that various districts, including Churchill, had been improperly formed under Act 150. Churchill was actually formed under Act 299 and not eligible for reorganization under Act 150. Weeks before trial the parties had filed a stipulation that the reorganization plan adopted under Act 150 did not involve Churchill. (700a.) There would have seemed to be no way that Churchill could be affected by the outcome of the litigation, and thus no reason to intervene. Nine years later the trial court justifies including Churchill in the remedy on the grounds that violations occurred under Acts 561 and 299, as well as Act 150, a theory never alleged in the Amended Complaint or in the trial on liability.

CONCLUSION

The decision below that establishes disparity of racial composition between districts, that eliminates the requirement of substantial evidence of segregatory intent, that imposes an arbitrary remedy of consolidation on a school district totally removed from whatever violation might be found here, flies directly in the face of the rulings of this Court and will establish a precedent that presages innumerable suits of a similar nature. The decision that permits such a result when the affected school districts were never parties defendants during the liability phase of the case offends basic due process. It should be reversed by this Court. Certiorari should be granted to accomplish this reversal now.

Respectfully submitted,

J. ROBERT MAXWELL, ESQ.
Maxwell & Huss
Farmers Bank Building
301 Fifth Avenue
Pittsburgh, Pennsylvania 15222
(412) 281-1658
Attorney for Petitioner Churchill Area School District

PHILIP B. KURLAND
Two First National Plaza
Chicago, Illinois 60603
(312) 372-2345
Of Counsel

Appendix

APPENDIX A

UNITED STATES COURT OF APPEALS

For the Third Circuit

Nos. 81-1691, 81-1692, 81-1693, 81-1694, 81-1695, 81-1790, 81-1986, 81-1987 and 81-1988

DOROTHY HOOTS, individually and as mother of her children, JANELLE HOOTS and JAMIE HOOTS; MRS. ADDRALLACE KNIGHT, individually and as mother and natural guardian of her children RONALD KNIGHT, LORETTA KNIGHT, TERRANCE KNIGHT, MARC KNIGHT and BYRON KNIGHT; BARBARA SMITH, individually and as mother and natural guardian of her children TAWANDA SMITH, TEVELA SMITH, JOSEPH SMITH, WESLEY SMITH and ERIC SMITH; on behalf of themselves and all others similarly situated; Mae Helen Woody, Juanita Jordan

vs.

COMMONWEALTH OF PENNSYLVANIA; EDWARD X. HALLENBERG, President of the Allegheny County Board of School Directors; THE ALLEGHENY COUNTY BOARD OF SCHOOL DIRECTORS; W. DEMING LEWIS, Chairman of the PENNSYLVANIA STATE BOARD OF EDUCATION, MICHAEL SULLIVAN, President of the School District of the Borough of Braddock, THE SCHOOL DISTRICT OF THE BOROUGH OF BRADDOCK, ANDREW LISYAK, President of the School Board of the School District of the Borough of Rankin; THE SCHOOL DISTRICT OF THE BOROUGH OF RANKIN, LEO CAMPBELL, President of the School Board of the School District of the Borough of North Braddock; and THE SCHOOL DISTRICT OF THE BOROUGH OF NORTH BRADDOCK; THE ALLEGHENY INTERMEDIATE UNIT BOARD OF SCHOOL DIRECTORS and EDWARD X. HALLENBERG AS PRESIDENT OF THE ALLEGHENY INTERMEDIATE BOARD OF SCHOOL DIRECTORS

CHURCHILL AREA SCHOOL DISTRICT
EDGEWOOD SCHOOL DISTRICT
SWISSVALE AREA SCHOOL DISTRICT
TURTLE CREEK AREA SCHOOL DISTRICT

School District of Edgewood,
Appellant in 81-1691

School District of Churchill Area,
Appellant in 81-1692

School District of Swissvale Area,
Appellant in 81-1693

School District of Turtle Creek Area,
Appellant in 81-1694

Swissvale Area School District, Churchill Area School District, Edgewood School District and Turtle Creek Area School District,
Appellants in 81-1695

School Districts of Churchill Area, Edgewood, Swissvale Area and Turtle Creek Area,
Appellants in 81-1790

Allegheny County Intermediate Unit and Allegheny County School Board,
Appellants in 81-1986

Commonwealth of Pennsylvania, W. Deming Lewis, Chairman of the Pennsylvania State Board of Education and the Pennsylvania State Board of Education,
Appellants in 81-1987

Edward Hallenberg,
Appellant in 81-1988

Appeal From the United States District Court
For the Western District of Pennsylvania
D.C. Civil No. 71-0538

Present: GIBBONS, HUNTER and GARTH, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel on December 18, 1981.

On consideration whereof, it is now here ordered and adjudged by this Court that the orders of the said Ditrict Court entered: April 28, 1981 (C.A Nos. 81-1691/2/3/4 and 81-1986/7/8); March 5 and 24, April 6 and 15, 1981 (C.A.No. 81-1790); and, May 6, 1981 (C.A. No. 81-1695), be, and the same are hereby affirmed in accordance with the opinion of this Court. Costs taxed againt appellants.

ATTEST:
/s/ Sally Mrvos
Sally Mrvos
Clerk

February 1, 1982

UNITED STATES COURT OF APPEALS
For the Third Circuit

Nos. 81-1691, 81-1692, 81-1693, 81-1694, 81-1695,
81-1790, 81-1986, 81-1987 and 81-1988

Dorothy Hoots, individually and as mother of her children, Janelle Hoots and Jamie Hoots; Mrs. Addrallace Knight, individually and as mother and natural guardian of her children Ronald Knight, Loretta Knight, Terrance Knight, Marc Knight and Byron Knight; Barbara Smith, individually and as mother and natural guardian of her children Tawanda Smith, Tevela Smith, Joseph Smith, Wesley Smith and Eric Smith; on behalf of themselves and all others similarly situated; Mae Helen Woody, Juanita Jordan

v.

Commonwealth of Pennsylvania; Edward X. Hallenberg, President of the Allegheny County Board of School Directors; The Allegheny County Board of School Directors; W. Deming Lewis, Chairman of the Pennsylvania State Board of Education; Michael Sullivan, President of the School District of the Borough of Braddock, The School District of the Borough of Braddock, Andrew Lisyak, President of the School Board of the School District of the Borough of Rankin; The School District of the Borough of Rankin, Leo Campbell, President of the School Board of the School District of the Borough of North Braddock; and The School District of the Borough of North Braddock; The Allegheny Intermediate Unit Board of School Directors and Edward X. Hallenberg as President of the Allegheny Intermediate Board of School Directors

Churchill Area School District, Edgewood School District, Swissvale Area School District, Turtle Creek Area School District

School District of Edgewood,
Appellant in 81-1691

School District of Churchill Area,
Appellant in 81-1692

School District of Swissvale Area,
Appellant in 81-1693

School District of Turtle Creek Area,
Appellant in 81-1694

Swissvale Area School District, Churchill Area School District, Edgewood School District and Turtle Creek Area School District,
Appellants in 81-1695

School Districts of Churchill Area, Edgewood, Swissvale Area and Turtle Creek Area,
Appellants in 81-1790

Allegheny County Intermediate Unit and Allegheny County School Board,
Appellants in 81-1986

Commonwealth of Pennsylvania, W. Deming Lewis, Chairman of the Pennsylvania State Board of Education and the Pennsylvania State Board of Education,
Appellants in 81-1987

Edward Hallenberg,
Appellant in 81-1988

APPEAL FROM THE UNITED STATES DISTRICT COURT
For the Western District of Pennsylvania

(D.C. Civil No. 71-0538)

Argued December 18, 1981

Before: GIBBONS, HUNTER AND GARTH, *Circuit Judges*

(Opinion filed February 1, 1982)

Thomas A. Gottschalk (Argued)
Attorney for School District of Edgewood and Turtle Creek Area

Carl W. Brueck
Brueck and Houck
Attorneys for School District of Edgewood

Philip B. Kurland (Argued)
John J. Coffey
Rothschild, Barry & Myers
J. Robert Maxwell
Maxwell and Huss
Attorney for School District of Churchill Area

Frank Goodman (Argued)
Attorney for Swissvale Area School District

Allen C. Warshaw (Argued)
Deputy Attorney General,
Chief Civil Litigation
W. Deming Lewis
Deputy Attorney General
William A. Webb
Deputy Attorney General

LeRoy S. Zimmerman
Attorney General for the
Commonwealth of Pennsylvania
Attorneys for Commonwealth of Pennsylvania, State Board of Education and W. Deming Lewis

Anton W. Bigman (Argued)
Linda A. Blumkin
Fried, Frank, Harris, Shriver
& Jacobson
Attorneys for General Braddock Area School District

Thomas J. Henderson (Argued)
Jack Greenberg
James M. Nabrit, III
James S. Liebman (Argued)
Neighborhood Legal Services
Attorneys for Dorothy Roots, etc., et al.

G. N. Evashavik
Evashavik, Capone, Evans
& Della Vecchia

Robert H. Bork
Kirkland & Ellis
Attorneys for Turtle Creek Area School District

J. Frank McKenna, III
Thorp, Reed & Armstrong
Attorneys for East Allegheny School District

Michael I. Levin
Cleckner and Fearen
Attorneys Amicus Curia,
Pennsylvania School Boards
Association

Thomas Rutter
William C. Andrews
Goehring, Rutter & Boehm
Attorneys for Edward X. Hallenberg
and Allegheny Intermediate Unit
Allegheny County School Board

OPINION OF THE COURT

HUNTER, *Circuit Judge.*

1. This decision is the ninth chapter in the history of this decade-old school desegregation case.[1] The plaintiff class consists of parents of children who attend public schools in the General Braddock Area School District ("GBASD") in Allegheny County, Pennsylvania. Defendants are the Commonwealth of Pennsylvania, the Pennsylvania State Board of Education (the "State Board"), the Allegheny Board of Education (the "County Board," later succeeded by the "Intermediate Unit"), and several of the Boards' officers. Plaintiffs filed a complaint on June 9, 1971, alleging that the consolidation of various school districts in Allegheny County by the Commonwealth of Pennsylvania, acting through the State and County Boards, had resulted in the creation of racially segregated schools. The district court, in *Hoots II,* held that the creation of GBASD by the State and County Boards was "an act of *de jure* discrimination in violation of the Fourteenth Amendment." *Hoots II,* 359 F. Supp. at 823. Various plans were considered by the district court as possible remedies for the continuing violations of plaintiffs' constitutional rights. In

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[1] The other decisions are: Hoots v. Commonwealth of Pennsylvania, 334 F. Supp. 820 (W.D. Pa. 1972) ("*Hoots I*"); Hoots v. Commonwealth of Pennsylvania, 359 F. Supp. 807 (W.D. Pa. 1973) ("*Hoots II*"); Hoots v. Commonwealth of Pennsylvania, 495 F.2d 1095 (3d Cir.), *cert. denied,* 419 U.S. 884 (1974) ("*Hoots III*"); Hoots v. Commonwealth of Pennsylvania, 587 F.2d 1340 (3d Cir. 1978) ("*Hoots IV*"); Hoots vs. Commonwealth of Pennsylvania, 639 F.2d 972 (3d Cir. 1981) ("*Hoots V*"); Hoots v. Commonwealth of Pennsylvania, 510 F. Supp. 615 (W.D. Pa. 1981) ("*Hoots VI*"); Hoots v. Commonwealth of Pennsylvania, (W.D. Pa., 71-258, April 16, 1981) ("*Hoots VII*"); Hoots v. Commonwealth of Pennsylvania, (W.D. Pa., 71-258, April 28, 1981) ("*Hoots VIII*").

In addition, we have denied plaintiffs' applications for writ of mandamus on two occasions. Hoots v. Weber, No. 79-1474 (3d Cir. May 2, 1979); Hoots v. Weber, No. 80-2124 (3d Cir. Sept. 9, 1980).

March 1981, the court decided which of numerous school districts could be included in any multidistrict remedy under the guidelines of *Milliken v. Bradley*, 418 U.S. 717 (1974), *Hoots VI*, 510 F. Supp. at 619. In April 1981, the district court approved the consolidation plan presently under appeal.[2]

2. Defendants' present appeal is based on two contentions. First, they argue that *Hoots II*, in which the district court found a constitutional violation, was incorrectly decided, in that the district court did not find *intentional* or *purposeful* segregative acts on the part of state officials. Second, defendants contend that the district court erred in fashioning the multidistrict remedy that it ultimately chose.

3. We find defendants' arguments unpersuasive and we affirm the rulings of the district court.

1. FACTS AND PROCEDURAL HISTORY

4. The facts of this case, especially those which lead to the initial filing of the complaint in this action, are ably and extensively set forth in the district court's May 1973 opinion. *See Hoots II*, 359 F. Supp. 807. The procedural posture of the case has been recited on numerous occasions by this court: *Hoots IV*, 587 F.2d 1340; *Hoots V*, 639 F.2d 972. Here, we will summarize those accounts and then supplement them with a recital of subsequent events leading to the instant appeal.

5. During the 1960's, the Commonwealth of Pennsylvania on three occasions enacted legislation to reorganize the school districts in Pennsylvania's public school system. The Act of September 12, 1961, P.L. 1283, No. 561, 24 P.S. §281 *et seq.* ("Act 561"), directed each county board of school directors to prepare a plan of organization of school districts for the county for review by the State Board of Education. This Act was superseded, although not substantively altered, by the Act of

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[2] Applications for a stay of *Hoots VIII* have been denied by the district court, this court and the United States Supreme Court (June 29, 1981). *See* Appendix at 3180a, 3181a-3186a.

August 8, 1963, P.L. 564, No. 299, 24 P.S. §2-290 *et seq.* ("Act 299"), and the Act of July 8, 1968, P.L. 299, No. 150, 24 P.S. §2400.1 *et seq.* ("Act 150"). Act 299 instructed the county boards to prepare on or before July 1, 1964 a plan of organization of school districts for the county and directed the State Board of Education to review organization plans prepared by the county boards and to approve such plans as it deemed wise and in the best interest of the educational system of Pennsylvania.

6. Acts 299 and 150 provided for the plans of organization of school districts to conform to standards which were to be prepared by the State Board. In preparing these standards, the State Board was instructed to take into account: topography, pupil population, community characteristics, transportation of pupils, use of existing buildings, existing administrative units, potential population changes and the capability of providing a comprehensive plan of education, 24 P.S. §§2400.1, 2400.2; 24 P.S. §§2-291, 2-292. Both Acts also stipulated that no school district should, as a general rule, have a pupil population of fewer than 4,000 students.[3]

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[3] Pursuant to these provisions, the State Board adopted Standards for Approval of Administrative Units. These standards provided, *inter alia*, that:

> (a) An administrative unit shall make available an educational program and educational opportunities to meet the varying needs, aptitudes, abilities, and interests of individuals residing in the administrative unit.
>
> (b) Consideration should be given to whether a geographic area has developed the characteristics of a community. Community, as used here, includes one or more municipalities and the surrounding territory from where people came for business, social, recreational, fraternal or similar reasons. Neither race or religion shall be a factor in determining administrative unit boundaries and differences in the social and economic level of the population shall not be a basis to determine these boundaries.

A letter from the Superintendent of the Department of Public Instruction advised the County Boards, including the Allegheny County Board, that the intent of the language of the last sentence of

(Footnote continued on following page.)

7. The State and County Boards, pursuant to these statutes, established GBASD (63% Black) on July 1, 1971, in the central eastern area of Allegheny County, east of Pittsburgh and north of the Monongahela River. The boards also created the predominately or all-white school districts of Turtle Creek (98.1% white), Swissvale (97.3% white), and Churchill (99.2% white), which border on GBASD, and the Edgewood School District (97.8% white), which is situated within approximately one mile of the GBASD. Appendix at 3233a. GBASD served the area consisting of the geographic limits of the Boroughs of Braddock, North Braddock and Rankin. Braddock, North Braddock and Rankin are economically depressed, declining communities. The residents of these municipalities are poor and less educated than those of the other school districts in

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(Footnote continued from preceding page.)

the above paragraph was to prevent *de jure* segregation through the fixing of school district boundaries and that the language was not to be construed to permit *de facto* segregation on the basis of race, religion or national origin which is by law prohibited.

> (c) An administrative unit shall utilize existing buildings to the maximum extent practical avoiding unnecessary new construction where possible.
>
> (d) Pupil population changes may be considered in the planning of administrative units where the changes are supported by reliable studies of area development showing past pupil population trends and future projections based on recognized statistical methods.
>
> (e) Consideration shall be given to the capability of providing a comprehensive program of education which shall mean the ability to educate and train each child within his capacity to the extent demanded by the immediate requirements of his growth and his relationship to the strengthening of this Commonwealth and nation, and shall include, but not be limited to, wealth per pupil, qualifications of professional staff, enrollment and diversification of curriculum.

Hoots II, 359 F. Supp. at 812-13 (exhibit citations omitted). We note that the parties throughout their briefs and in oral argument have referred to the Standards as the "Section 7(c) issue." Paragraph 7(c) is identical to the verbatim quotation of paragraph 3(b) above. *See* Appendix 319a-20a.

question. The recreational and shopping facilities within these communities have been rapidly declining and becoming increasingly older in average age. The boroughs of Braddock, North Braddock and Rankin have no characteristics that will attract or retain persons who have the financial means and opportunity to live elsewhere. Finally, the populations of these three communities are becoming increasingly non-white at an accelerated pace. *Hoots II*, 359 F. Supp. at 814 (Findings of Facts 20-27).

8. Plaintiffs filed this action on June 9, 1971. In December 1971, the district court denied defendants' motion to dismiss the complaint for failure to state a cause of action, concluding that "allegations of deliberate creation of racially segregated school districts state a cause of action." *Hoots I*, 334 F. Supp. 820, 822.

9. The district court also rejected motions by defendants seeking to join involuntarily as defendants the five school districts discussed in the complaint. However, the court stated that it would permit the school districts to intervene voluntarily in the action if they so desired. *Hoots I*, 334 F. Supp. at 823. The school districts did not do so. After the district court "instructed [the Commonwealth] to give notice" of the suit to those school districts, and after the Attorney General of Pennsylvania wrote the five districts urging them "to intervene in this action immediately," the districts informed the court that they had "no interest in being" in the lawsuit, and were "deliberately not intervening." *See Hoots II*, 359 F. Supp. at 821; *Hoots III*, 495 F. 2d at 1097; Appendix at 56a-61a, 614a, 2712a, 3383a, 3389a.

10. On May 15, 1973, the district court held that the State and County Boards' creation of the identifiably black GBASD and the identifiably white Churchill, Edgewood, Swissvale and Turtle Creek districts "constituted an act of *de jure* discrimination in violation of the Fourteenth Amendment." *Hoots II*, 359 F. Supp. at 823. The court ordered the defendants to submit promptly a desegregation plan, to take effect as early as

possible, to achieve the greatest possible degree of desegregation within the public schools of the central eastern area of Allegheny County. *Hoots II*, 359 F. Supp. at 824-25. Specifically, the court ordered defendants to "prepare and submit to this Court within 45 days from the date of this Order a comprehensive plan of school desegregation" which "shall alter the boundary lines of the General Braddock Area School District and as appropriate of adjacent and/or nearby school districts." *Id.* at 824. Defendants did not appeal.

11. In April 1974, after the district court's violation finding in *Hoots II*, Churchill, Edgewood, Swissvale and Turtle Creek petitioned to intervene. The district court granted these petitions insofar as they sought prospective intervention, but denied them insofar as they sought retroactive intervention. Churchill and Turtle Creek appealed this partial denial of their motions. We affirmed the district court, holding that the retroactive intervention petitions were untimely. *See Hoots III*, 495 F.2d 1095, 1097 (3d Cir.), *cert. denied*, 419 U.S. 884 (1974).

12. The defendants did not submit a comprehensive plan of school desegregation within 45 days. In the following years, after granting defendants numerous extensions of time within which to develop effective desegregation plans, the district court found it necessary to reject as inadequate six plans[4] submitted by the Commonwealth and the defendant districts. Five of the plans were interdistrict in nature, and four involved the consolidation of some or all of the school districts presently involved in this case into one or more new school districts. *See Hoots IV*, 587 F. 2d at 1344-46; *Hoots V*. 639 F. 2d at 975-77; *id.* at 984-86 (Higginbotham, J., concurring).

13. Plaintiffs appealed twice during the 1973-1980 period. On both occasions they asked this court for a remedial order ending school segregation in central eastern Allegheny County. We dismissed plaintiffs' first appeal in 1978 but we expressed

[4] Plans 22W, A, B and Z, the Tuition Plan and the Upgrade Plan.

"confiden[ce] that . . . an appropriate final order" would "be entered by year end" 1978. *Hoots IV*, 587 F.2d at 1351. In August 1980, after the district court denied plaintiffs' motion for injunctive relief for the second school year since 1978, plaintiffs appealed again. On January 26, 1981, we stated:

> We believe it to be essential that the district court afford relief to [plaintiffs] that will be effective in the fall of 1981. *Under no circumstances should a new school year begin in the fall of 1981 without an acceptable remedial plan in place.*
>
> Accordingly, we order the district court to expedite its consideration of this case so that within ninety days of the issuance of the mandate of this court it shall:
>
> 1) complete all hearings and necessary proceedings on the merits of the competing remedial plans for the desegregation of GBASD;
>
> 2) decide the *Milliken v. Bradley* issue of which school districts may be included within an interdistrict remedy; and
>
> 3) enter an appropriate final order granting appellants the relief to which they are entitled under the district court's order of May 15, 1973, such relief to be effective and implemented by the beginning of the first semester of the school year in the fall of 1981.

Hoots V, 639 F.2d at 980-81 (footnotes omitted) (emphasis added).

14. On March 5, 1981, the district court entered an opinion and order reaffirming its 1973 interdistrict violation finding. It concluded that the violation involved seven central eastern area school districts (including the five districts involved in this appeal), and determined that a multidistrict remedy involving some or all of those districts was appropriate. *Hoots VI*, 510 F. Supp. at 619.

15. On April 6, 1981, the district court rejected two remedial plans filed by defendants—the Upgrade Plan and the Tuition Plan—because neither could "achieve effective desegre-

gation." *Hoots VII* at 2, 4; Appendix at 1379a, 1381a. The court concluded that "only an interdistrict remedy is feasible here, and . . . that only a single new district be formed from the consolidation because of the many difficulties presented by plans of consolidation into multiple new districts on which we have heard testimony in prior hearings." *Hoots VII* at 3; Appendix at 1380a. Accordingly, the court ordered hearings on the remedy to be held on April 20, 1981, "solely for the purpose of remedying the constitutional violations found to have been imposed on the plaintiffs here." *Hoots VII* at 4; Appendix at 1381a.

16. On April 28, 1981, the district court entered its first remedial order. *Hoots VIII;* Appendix at 883a. The court found:

> that a New School District composed of the present school districts of Churchill, Edgewood, Swissvale, General Braddock, and Turtle Creek would achieve desegregation of the General Braddock Area School District and would achieve the highest beneficial results over and above the results of any other plan submitted to this Court by any party during the whole period of this litigation.

Hoots VIII at 6; Appendix at 889a. The court accordingly ordered

> "[t]he Secretary of the Pennsylvania Department of Public Instruction, or his designate, and the Allegheny County Intermediate Unit [to] meet with the Interim Operating Committee of the New School District on or before the 15th day of June, 1981, to design a plan of desegregation and provide for its implementation with the beginning of the 1981-82 school year, and [to] continue such planning until such plan is fully operational within the New School District."

Hoots VIII at 17; Appendix at 900a.

17. After further hearings, the district court entered two orders on July 23 and August 13, 1981, setting forth the details

of a plan of desegregation of the New District. That plan was implemented on September 8, 1981. After more than a decade since the filing of the complaint, a remedy for the violation of plaintiffs' constitutional rights was granted them.[8]

II. DISCUSSION

18. Defendants' present appeal is based on two grounds. First, defendants argue that the district court erred in holding that the defendants had violated the fourteenth amendment because, they argue, the district court found no intentional or purposeful segregation on the part of state officials. Second, defendants argue that the district court erred in fashioning a multidistrict remedy. We disagree.

A. *The Constitutional Violation Finding*

19. Defendants' argument regarding the district court's finding of intentional or purposeful segregation is twofold. First, they contend that the district court in *Hoots II* did not properly state a constitutional violation in terms of a "segregative purpose or intent" standard, as is required by the Supreme Court's decision in *Keyes v. School District No. 1*, 413 U.S. 189, 208 (1973). Second, even if the district court utilized the "purpose or intent" standard, defendants argue that there is no evidence on the record that would justify a constitutional violation finding.

1. *The Segregative Purpose or Intent Legal Standard*

20. It is not disputed that *Keyes* was the first Supreme Court decision to articulate the requirement of proof of segregative intent or purpose to establish a *prima facie* case of *de jure* school segregation in a northern state without a history of segregation statutes. 413 U.S. at 208. Although *Hoots II* was

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[8] Two related appeals were consolidated with this one by order of this court on August 20, 1981. They are Hoots v. Commonwealth of Pennsylvania, Nos. 81-2298, 81-2787, 81-2788 and Hoots v. Commonwealth of Pennsylvania, No. 81-2732.

decided prior to *Keyes*, so that the district court could not possibly have tracked the language of that case, we find that the district court in *Hoots II* satisfied the requirement of proof of intentional or purposeful segregation.

21. The *Keyes* decision did not simply require proof of intent or purpose; it also held that the requisite intent or purpose can be established by inference, as well as by direct proof. 413 U.S. at 201, 208-09. The *Keyes* doctrines were amplified in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), where the Court explained that proof of segregative intent or purpose may be accomplished in various ways, and to varying degrees, and still satisfy the dictates of *Keyes:*

> [The requirement of] proof of racially discriminatory intent or purpose] does *not* require a plaintiff to prove that the challenged action rested *solely* on racially discriminatory purposes. Rarely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the "dominant" or "primary" one.
>
> Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such *circumstantial and direct evidence of intent as may be available.* The impact of the official action—whether it "bears more heavily on one race than another." *Washington v. Davis.* [426 U.S. 229,] 242 [(1976)]—may provide an important starting point. Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face. . . .

429 U.S. at 265-67 (emphasis added) (citation omitted).

22. Proof of segregative purpose or intent was again discussed in *Columbus Board of Education v. Penick*, 443 U.S. 449 (1979), where the Supreme Court re-explained the meaning of segregative intent in the context of school desegregation cases:

> [T]he District Court correctly noted that *actions having foreseeable and anticipated disparate impact are relevant evidence to prove the ultimate fact, forbidden purpose. Those cases do not forbid "the foreseeable effects standard from being utilized as one of the several kinds of proofs from which an inference of segregative intent may be properly drawn."* Adherence to a particular policy or practice, "with full knowledge of the predictable effects of such adherence upon racial imbalance in a school system is one factor among many others which may be considered by a court in determining whether an inference of segregative intent should be drawn."

443 U.S. at 464-65 (emphasis added) (citations omitted).

23. Bearing in mind that proof of segregative intent or purpose can be accomplished in a number of ways, we turn to an examination of record. The first indication that the district court was using an appropriate constitutional standard was in *Hoots I*, in which it denied defendants' motion to dismiss plaintiffs' complaint for failure to state a cause of action. The court explicitly emphasized that plaintiffs' complaint contained allegations that "[i]n preparing and adopting the school reorganization plans defendants *intentionally and knowingly created racially segregated school districts. . . .*" *Hoots I*, 334 F. Supp. at 821-22 (emphasis added). From the very beginning of this lawsuit, then, it has been clear that the district court was couching the issues in terms of intentional segregation. And, in *Hoots II*, after full trial, the district court stated conclusions of law which demonstrate that the court was addressing questions of intent and purpose.[8] For example:

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[8] Indeed, courts looked for intentional segregation in segregation cases well before *Keyes* required them to do so. *See e.g.*, Sealy v. Department of Public Instruction, 252 F.2d 398, 901 (3d Cir. 1958). *Accord*, Swann v. Charlotte-Mecklenburg Board of Education, 401 U.S. 1, 17-18 (1971), expressly reaffirmed in *Keyes*, 413 U.S. at 208 & n.16, and cited in *Hoots II*, 359 F. Supp. at 823-24.

> A violation of the Fourteenth Amendment has occurred when public school authorities have made educational policy decisions which were *based wholly or in part on considerations of the race of students* and which contributed to increasing racial segregation in the public schools.
>
> School authorities may not, consistent with the Fourteenth Amendment, maintain segregated schools or permit educational choices contributing to the development and growth of segregated schools *because of community sentiment or the wishes of a majority of voters.*

Hoots II, 359 F. Supp. at 822 (emphasis added) (citations omitted). This is the language of intention and purpose.

24. That the district court used the appropriate legal standard (*i.e.*, that the court was looking to segregative purpose or intent) in reaching its violation finding is established beyond cavil when we analyze certain factual conclusions by the district court. Some examples are:

(1) "Because the *State and County Boards in devising this plan* of organization of administrative units for the central eastern portion of Allegheny County *were influenced by* the desires of the surrounding municipalities to avoid being placed in a school district with Braddock and Rankin because of the high concentration of blacks within these two municipalities, *race was a factor*, at least indirectly, in the formation of the school district composed of Braddock, North Braddock, and Rankin." *Hoots II*, 359 F. Supp. at 821, reaffirmed in *Hoots VI*, 510 F. Supp. at 619 (emphasis added).

(2) "[T]he record contained no evidence showing that the school district boundaries established in the plan of organization of administrative units are rationally related to any legitimate purpose and the court found

that those boundaries did not promote any valid state interest." *Hoots VI,* 510 F. Supp. at 619, reaffirming *Hoots II,* 359 F. Supp. at 821, 822.[7]

(3) The court noted that "the history of the reorganization of school district boundaries in the central eastern portion of Allegheny County pursuant to Acts 561, 299 and 150," revealed that the County Boards had acted over a period of years with the intention of guarding the white communities from Rankin, Braddock and North Braddock. *See Hoots VI,* 510 F. Supp. at 619, reaffirming *Hoots II,* 359 F. Supp. at 811-13, 816-17.

(4) "The natural, foreseeable and actual effect of [the Boards' decisions] was to perpetuate, exacerbate and maximize racial segregation within the public schools of the central eastern portion of Allegheny County." *Hoots II,* 359 F. Supp. at 821, reaffirmed in *Hoots VI,* 510 F. Supp. at 618.

We have on other occasions followed the Supreme Court's reasoning that "proof of foreseeable consequences is one type of quite relevant evidence of racially discriminatory purpose." *Dayton Board of Education v. Brinkman II,* 443 U.S. 526, 536 n.9 (1979); *C.F. Richardson v. Pennsylvania Department of Health,* 561 F.2d 489, 492 (3d Cir. 1977), *citing Washington v. Davis,* 426 U.S. 229 (1976), and *Arlington Heights, supra.*

25. Finally, after having intent language in *Keyes* and *Milliken* brought to its attention, the district court explicitly reaffirmed its violation conclusion based on findings of purposeful official segregation. For example, in 1975, after the former districts filed motions to dismiss based on the alleged absence

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[7] In *Columbus Board of Education, supra,* the Supreme Court stated that "a series of Board actions and practices that cannot reasonably be explained without reference to racial concerns" and that causes "racial separation in the schools" strongly evidences intentional discrimination. 443 U.S. 461-62.

of "deliberate purposeful intent to segregate or invidiously discriminate or create a dual system. . . (as required by *Brown* through *Keyes* and *Milliken*)," the district court reopened the violation issue and permitted the districts to present testimony "by the State Board explaining actions [in the 1960's] that may have appeared to be racially motivated" but assertedly were not. Appendix at 2673a, 2799a. After hearing argument, the district court rejected appellants' contentions, based in part on State Board chairman Paul Christman's admission that Board members "knew they were heading into a segregation problem" in the central eastern area. Appendix at 2737a, 2762a. When counsel for Churchill School District argued that the district court "would have come to a different conclusion [in *Hoots II*] if [it] were making [its] order . . . after *Keyes*," Chief Judge Weber stated: "This is one place where you can say [you are] 100 percent wrong." Appendix at 2739a. The court then reaffirmed its earlier holding that the Board had "purposefully" segregated GBASD. Appendix at 2761a.

26. Furthermore, the court, in its November 11, 1979 Memorandum Order, indicated that the plaintiffs had established: that "segregative intent" had been demonstrated, Appendix at 3201a-3202a; that "racially discriminatory acts of the state have been a substantial cause of interdistrict segregation." *Hoots VI*, 510 F. Supp. at 619; that "district lines have been deliberately drawn on the basis of race," *id.* at 616, *quoting Milliken;* and that GBASD was "intentional[ly] creat[ed] as a racially identifiable school district," *Hoots VIII* at 9; Appendix at 892a.

27. In short, there is no question that the district court utilized the correct legal standard—intentional or purposeful segregation. Obviously, it could not, in *Hoots II*, have cited the exact language of the forthcoming *Keyes* opinion. That does not mean, however, that *Hoots II* does not comply with the standards enunciated in *Keyes*, and we hold today that *Hoots II* did comply with those standards.

2. *The Factual Evidence of Segregative Purpose or Intent*

28. Having decided that the district court used the correct legal standard, we now turn to the question of whether the court's finding of intentional racial segregation, based on the evidence it cited, was clearly erroneous under Fed. R. Civ. P. 52(a).[8]

29. For an appellate court to find that a trial court's conclusion was clearly erroneous, the reviewing court must be "left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948). The Supreme Court has also cautioned that adherence to this standard of review is particularly important in a desegregation case because of the trial court's "proximity to local [school] conditions." *Brown v. Board of Education II*, 349 U.S. 294, 299 (1955), and because the trial court's "[f]indings as to design, motive and intent . . . depend [so] peculiarly upon the credit given to witnesses by those who see and hear them." *United States v. Yellow Cab Co.*, 338 U.S. 338, 341-42 (1949).

30. The heavy burden on a party attempting to overcome the clearly erroneous standard in a case of this nature was stated recently by Chief Justice Burger, concurring in *Columbus:*

> Like Mr. Justice Rehnquist, I have serious doubts as to how many of the post-1954 actions of the Columbus Board of Education can properly be characterized as segregative in intent and effect. *On this record I might very well have concluded that few of them were. However, like Mr. Justice Stewart, I am prepared to defer to the trier of fact because I find it difficult to hold that the errors rise to the level of "clearly erroneous" under Rule 52.* The District Court did

[8] Rule 52(a) provides, in part: "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses."

> find facts sufficient to justify the conclusion reached by Mr. Justice Stewart that the school "district was not being operated in a racially neutral manner" and that the Board's actions affected "a meaningful portion" of the school system. *Keyes v. School Dist. No. 1, Denver, Colo.*, 413 U.S. 189, 208 (1973).

443 at 468 (emphasis added).

31. In the briefs and in oral argument plaintiffs have explicated much of the direct and circumstantial evidence relied upon by the district court in reaching its violation determination. We will recite some of that evidence here. All of the following examples were cited and relied upon by Chief Judge Weber in *Hoots II*, 359 F. Supp. at 816-17.

> (1) There was in evidence a letter to the County Board in 1964 from a Mrs. Ryland, a resident of Turtle Creek, requesting the Board to shield the white children of Turtle Creek from "colored people [of] the kind that live in North Braddock, Braddock, and Rankin." Appendix at 300a.
>
> (2) There was in-court testimony by a central eastern area municipal official, Joseph D. Suley, admitting that he and his colleagues had pressured State and County Board members in the 1960's to insulate their municipalities (Braddock Hills, Turtle Creek and East Pittsburgh were mentioned by name) from merger with Braddock and Rankin because of "the black issue" and because of the "bitterness" felt by "whites" towards "blacks" in the area. Appendix at 118a-126a.[9]

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[9] Defendants argue that Mrs. Ryland's letter should not have been admitted and that significant portions of Suley's testimony were hearsay. Our review of the record reveals no timely objections by the defendants, but does disclose that at the *end* of Suley's testimony, a motion to strike was made. Appendix 149a. The district court reserved ruling on the motion, but ultimately did not grant it.

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(3) There was in evidence a suggestion in a 1965 State Board Staff report that "the non-white population . . . factor" contributed to certain municipalities' "opposition" to proposals to merge all those districts with Braddock and Rankin. After noting Turtle Creek's and East Pittsburgh's objections to merger with Braddock and Rankin, and North Braddock's objections to merger with Turtle Creek, the staff report stated that "the non-white population is *not* a factor in opposition to *Turtle Creek since* the percent of *non-white* is as follows: Braddock 55%, Rankin 51%, Braddock Hills 10%, East Pittsburgh 20%, North Braddock 10%, *Turtle Creek none.*" (Emphasis added.) Appendix at 310a, 699a. The point is clearly that one of the *reasons* that Turtle Creek's inclusion in the merger was not objectionable was because it had no "non-whites." The implication is that a high non-white factor would be a reason against a district's inclusion.

(4) There was an admission under oath by State Board Chairman Dr. Paul Christman that he approved the isolation of Braddock, Rankin and North Braddock from all its neighbors in 1965 despite his recogn[ition] of "a black-white factor there that was improperly dealt with . . ." He noted that the situation could "become even worse than it was at the time . . . in terms of [the] growth of percentage of blacks in those communities . . ." Appendix at 2702a-2703a.

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On appeal, defendants argue that the district court erred in failing to grant the motion to strike, and that the district court was clearly erroneous insofar as it inferred segregative intent from Suley's testimony and Mrs. Ryland's letter. Assuming without deciding that the motion to strike was properly presented to the district court at least with respect to Suley's testimony, we find no merit to the defendants' argument.

(5) There was in evidence a statement in a 1964 brief by Braddock Hills officials to the County Board which attributed the Board's refusal to merge Churchill with any of its neighbors to political pressure from Churchill "based on politics, race, color, or creed . . ." Appendix at 588a.

(6) There was in evidence a letter to State and County Board members signed by Thomas A. Harper, a Braddock School Board member, and LaRue W. Frederick, the President of the area NAACP chapter, attributing neighboring municipalities' opposition to merger with Braddock and Rankin to fear of an "influx of a large number of Negro students into heretofore predominantly white units" and of the placement of "Negroes on the School Board [and in] professional and non-professional [staff positions] in the school system." Appendix at 592a-593a.

(7) There was in evidence a statement made by County Board President L.W. Early during hearings in 1968 on North Braddock's appeal that "we are painfully aware of [the fact] that . . . over the years the surrounding school districts had sought to avoid a school merger which would include Braddock and Rankin in their school district and that it looked like Braddock was going to be 'left holding the bag.'" Appendix at 701a.

(8) There was in evidence a statement by a County Board member "call[ing] attention to the fact that the socio-economic factors involved in Turtle Creek—East Pittsburgh make it a homogeneous unit." Appendix at 308a.

(9) Dr. John Finger, plaintiffs' educational expert, testified that, in his professional opinion, it was possible to "infer from some of the [public] documents that . . . race, indeed, was taken into consideration" by public officials "in recreating school districts," and that those officials "ex-

clude[d] Rankin and North [Braddock] and Braddock from consolidation with neighboring white districts "because they are black." Appendix at 230a, 237a-38a.

32. In addition to specific pieces of direct evidence of segregative intent or purpose, we have already noted that the district court properly relied on circumstantial or "objective" evidence in *Hoots II*. *See* pp. 17-19 *supra*. The district court, for example, considered it significant that the Boards' redistricting plan disregarded statutory and administrative reorganization standards, *e.g.*, the statutory 4000 pupil minimum guideline, the requirement that existing facilities be used where possible, the requirement of racial and cultural diversity, and the requirement that each district be capable of providing a comprehensive educational program. *See Hoots II*, 359 F. Supp. at 819-20.

33. Furthermore, the district court properly weighed evidence such as the Board members' admitted knowledge that their redistricting decisions would cause and perpetuate segregation, the foreseeability of the segregative result, the Boards' formulation of boundaries that promoted no interest other than racial segregation, the Boards' rejection of alternative school district configurations in favor of a segregation-maximizing alternative, and the State Board's blatantly improper interpretation of its own "race regulation" to endorse the very evil the regulation was designed to prevent.[10] *Hoots II*, 351 F. Supp at 819-20.

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[10] In carrying out the Reorganizations Acts, the State Board promulgated guidelines including one stating that "[r]ace . . . *shall not be* [*a*] *factor* [] in determining administrative boundaries." *See* note 3 *supra*. In drawing the boundary lines in central eastern Allegheny County, State and County Board members admittedly applied a segregation "blind" interpretation of the guideline. That is, they pretended that they could be totally *oblivious* to race as a consideration—even if that meant that there would be greater segregative effects as a result of their actions. They adopted this stand

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34. Based upon this evidence, and upon the record as a whole, we find that the district court's constitutional violation finding was not clearly erroneous and, indeed, was fully supported by the record.

B. *The Multidistrict Remedy*

35. Defendants argue that the district court abused its discretion by consolidating the five school districts of Churchill, Edgewood, Swissvale, Turtle Creek, and GBASD into one desegregated district. We disagree.

36. We have noted before that "[i]n litigation as long and complex as this, the fashioning of relief should normally 'be entrusted in large measure to the sound discretion of the District Court Judge who has lived with [it] for so many years.' " *Hoots V*, 639 F.2d at 979, *quoting Gilmore v. City of Montgomery*, 417 U.S. 556, 577 (1977) (Marshall J., concurring). Furthermore, we said that

> [i]t is important to recognize that, as a reviewing court, we are not empowered to consider the matter *de novo*. The approval of a desegregation plan is committed to "the exercise of the district judge's discretion . . . [and] a school desegregation case does not differ fundamentally from other cases involving the framing of equitable remedies to repair the denial of a constitutional right." *Swann v. Board of Education*, 402 U.S. 1, 15-16. . . .

Evans v. Buchanan, 582 F.2d 760 (3d Cir. 1978) (further citations omitted).

(Footnote continued from preceding page.)

despite their knowledge that such an interpretation conflicted with the State Human Relations Commission regulations and state policy and would result in the perpetuation and aggravation of pre-existing segregation in the central eastern area. *Hoots II*, 359 F. Supp. at 818-19. The district court concluded that the Boards' adoption of this blatantly unacceptable and counter-intuitive interpretation of the "race" guideline provided circumstantial proof that the Boards' otherwise-inexplicable choice of this interpretation was invidiously motivated. We agree.

37. The controlling standards for examining the propriety of an interdistrict remedy were laid down by the Supreme Court in *Milliken:*

> The controlling principle consistently expounded in our holdings is that the scope of the remedy is determined by the nature and extent of the constitutional violation. *Swann,* 402 U.S. at 16. Before the boundaries of the separate and autonomous school districts may be set aside by consolidating the separate units for remedial purposes or by imposing a cross-district remedy, it must first be shown that there has been a constitutional violation within one district that produces a significant segregative effect in another district. Specifically, it must be shown that racially *discriminatory acts of the state or* local school districts, or of a single school district have been a substantial cause of interdistrict segregation. Thus, an interdistrict remedy might be in order where the racially discriminatory acts of one or more school districts caused racial segregation in an adjacent district, *or where district lines have been deliberately drawn on the basis of race.*

418 U.S. at 744-45 (emphasis added).[11]

38. In *Milliken* the Court held that a federal district court should not have ordered fifty-three suburban school districts to participate in the desegregation of the Detroit schools. The

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[11] *Milliken* also requires that "a meaningful opportunity for the included neighboring school districts to present evidence or be heard on the propriety of a multidistrict remedy or on the question of constitutional violations by those neighboring districts" be afforded to the school districts. 418 U.S. at 712-22 (footnote deleted). Here such a "meaningful opportunity" was afforded at all times. To the extent that the defendant school districts were precluded, after the district court's liability decision in 1973 in *Hoots II,* from arguing the question of whether there was intentional racial discrimination, we adhere to our earlier holding that the school districts' post-1973 intervention motions were untimely, *see Hoots III, supra,* 495 F.2d at 1097, and we reject the defendants' argument that the district court's decision should be reversed for failure to join necessary parties under Fed. R. Civ. P. 19.

Court was concerned that the relief granted in that case was totally disproportionate to the "nature and extent of the constitutional violation." 418 U.S. at 744. Because the district court had received evidence of *de jure* segregated conditions in the Detroit schools, the Court reasoned that "[t]o approve the remedy ordered . . . would impose on the outlying districts, not shown to have committed any constitutional violation, a wholly impermissible remedy." 418 U.S. at 745.

39. In this case, unlike *Milliken,* the court tailored the relief granted to fit the actual showing of *de jure* discrimination by *all* of the districts involved. Indeed, the remedy fashioned by the district court here was narrowly drawn.[12]

40. The district court granted relief after finding that the State and County Boards intentionally created GBASD and its neighbors as identifiably black and white districts, and that this interdistrict violation conducted by the State occurred during the reorganization process in the 1960's and "included the redrawing of school boundaries in that part of [*i.e.,* central eastern] Allegheny County." *Hoots VI,* 510 F. Supp. at 619. Furthermore, the district court quite clearly found the constitutional violation to be "the manner in which the school district lines were drawn," including both the racially motivated refusal of County and State Boards to exercise their "expressly retained . . . power to force further merger" of GBASD's component municipalities with the surrounding white municipalities, and "the very elimination [of GBASD] from consideration for merger with [the predominately white] districts." *Id.* at 620-21.

41. The court thus located and defined the *de jure* constitutional violation. Its explication of that violation was unambiguous. It proceeded to examine explicitly the dictates of

[12] We believe it bears repeating that Chief Judge Weber has very ably dealt with all of the intricate, complex, and hotly contested issues in this case since 1971.

Milliken and its progeny, and concluded that school districts in central eastern Allegheny County were created as part of the constitutional violation and that "[a] multidistrict remedy can be applied to [those] surrounding districts (whose) boundaries were drawn or redrawn during the course of the same violation which reacted the segregated school districts." *Id.* at 619.

42. Thus, it was rational for the court to conclude that an interdistrict remedy was appropriate in this case because it concluded that the violation itself was interdistrict in nature. That such a remedy is totally in harmony with *Milliken* is stressed by Justice Stewart in his concurrence in that case:

> This is not to say, however, that an interdistrict remedy of the sort approved by the Court of Appeals would not be proper, or even necessary, in other factual situations. Were it to be shown, for example, *that state officials had contributed to the separation of the races by drawing or redrawing school district lines,* see *Haney v. County Board of Education of Sevier County,* 429 F.2d 364; cf. *Wright v. Council of the City of Emporia,* 407 U.S. 451; *United States v. Scotland Neck Board of Education,* 407 U.S. 484; by transfer of school units between districts, *United States v. Texas,* 321 F. Supp. 1043, aff'd, 447 F.2d 441; *Turner v. Warren County Board of Education,* 313 F. Supp. 380; or by purposeful, racially discriminatory use of state housing or zoning laws, then a decree calling for transfer of pupils across district lines or for *restructuring of district lines might well be appropriate.*

418 U.S. at 755 (emphasis added). *See also, e.g., Evans v. Buchanan,* 416 F. Supp. 328, 340 (D. Del. 1976), *aff'd,* 555 F.2d 373 (3d Cir. 1977) ("Where the State has contributed to the separation of races by redrawing school lines, necessarily the districts on both sides of the lines are part of the violation itself."); *Penick v. Columbus Bd. of Ed.,* 429 F. Supp. 229, 266 (S.D. Ohio 1977), *aff'd,* 583 F.2d 787 (6th Cir. 1978), *aff'd,*

443 U.S. 449 (1979)("Actions and omissions by public officials which tend to make black schools blacker necessarily have the reciprocal effect of making white schools whiter.").[19]

43. The district court having found a constitutional violation and having properly determined that an interdistrict remedy was appropriate because the violation was committed in the process of drawing school district lines, we believe that the burden of proof shifted to each defendant school district to establish that that district in particular was not involved in the violation. *See Keyes, supra,* 413 U.S. at 208-10 (burden of proof may be shifted to defendants in proper circumstances for reasons of fairness and policy); *Evans v. Buchanan,* 582 F.2d 750, 764-66 (3d Cir. 1978)(en banc) (where *de jure* segregation is established, and where placing burden on plaintiffs to show precise incremental segregative effect would leave them without a remedy, burden shifts to defendants), *cert. denied,* 446 U.S. 923 (1980).

44. We have carefully considered the contentions of each of the defendant school districts that the district court was clearly erroneous in determining that their noninclusion in a

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[19] The district court also properly held that the State and County Boards violated the constitution in the manner in which the school district lines were drawn and so all surrounding districts can be implicated in a remedy, despite their alleged lack of involvement in the process.

> "Where the State has contributed to the separation of races by redrawing school lines, necessarily the districts on both sides of the lines are part of the violation itself, *and exclusion of the suburban districts cannot be predicated on their own purported innocence when their present lines were drawn or redrawn in the course of a violation.*"

Hoots VI, 510 F. Supp. at 620, *quoting* Evans V. Buchanan III, 416 F. Supp. at 340. In any event, the district court expressly found that "the surrounding districts" were *not* "innocent" of unconstitutional activity, since they "continually sought to avoid being included in a school district with [Braddock and Rankin] due to the high concentration of blacks" in those areas. *Hoots VI,* 510 F. Supp. at 620-21.

district with the GBASD was due to racial considerations. In light of the burden of proof, we are not persuaded that the district court committed error in rejecting the defendants' claims that not race but factors such as "transportation difficulties," the quality of the school districts' curricula, and so on, lay behind the noninclusion of Edgewood, Swissvale, Turtle Creek, and Churchill. *See Keyes, supra,* 413 U.S. at 210 (once burden is shifted to defendants, "it is not enough, of course, that the school authorities rely upon some allegedly logical, racially neutral explanation for their actions").[14]

45. In its April 28, 1981 opinion, rendered after the April 20-21 hearings, the district court set forth very clearly its reasons for the remedy in question:

> (1) It would produce a district with a school population 83% white and 17% minority (mostly black), within a general range of recognized desegregation guidelines and comparable to the population distribution over a wide area of Allegheny County.
>
> (2) The pattern of desegregation established is likely to remain stable.

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[14] Churchill argues strenously that it stands in a different position from any of the other defendants. First, it argues that the school district reorganization in central eastern Allegheny County was finally complete under Act 150, and that Act 150 contained a "grandfather clause" which protected any school district created before the passage of Act 150 from being consolidated against its wishes with another school district. As Churchill was created out of the consolidation of three smaller districts before Act 150 was passed and as Act 150 was never itself attacked as racially discriminatory, Churchill concludes the district court had no basis for holding that the failure to include Churchill in a larger district was based even in part on racial considerations. We agree with the district court, however, that "[t]his argument is without merit since the constitutional violation was not only committed under Act 150, but pursuant to the entire reorganization process that began with Act 561." *Hoots VI, supra,* 510 F. Supp. at 621.

(Footnote continued on following page.)

(3) All of the districts included are contiguous to each other, three of the districts border General Braddock, and the remaining district, Edgewood, borders one and almost borders another.

(4) The area of the New District is moderate in size (13.5 sq. miles) as compared to the average size of Allegheny County Districts (15 sq. miles).

(5) The district is roughly circular in configuration, lending itself to increased administrative and transportation efficiencies.

(6) All points in the district are within 2.5 miles radius of its center, and the greatest diameter from one edge of the district to the other is less than 5 miles.

(7) Student population density of the New District would be 821 per square mile, a high density compared to the 275 per square mile density of the average Allegheny County School District (excluding the City of Pittsburgh).

(Footnote continued from preceding page.)

Second, Churchill points to a statement in the continued district court in a Memorandum and Order dated November 18, 1977, that "no evidence exists of a deliberate, purposeful, segregative intent in the creation of the Churchill district that would subject it to an interdistrict remedy to achieve racial balance." Appendix 841a. As we read the district court's statement, however, it merely indicates that the formation of Churchill out of Wilkins, Forest Hills, and Chalfant (all of which were white districts) was not racially motivated. That statement, however, is no different from Edgewood's argument that its lack of desire for a merger with another white district —Swissvale—disproves any racial motivation. Both arguments miss the point: whether a school district desires to merge with other white districts (as in the case of the three which merged to form Churchill), or does not (as in the case of Edgewood and Swissvale), says little about whether that district's failure to be included in a still larger district along with GBASD, was due to racial considerations. Thus the district court's 1977 observation in no way undermines the district court's present conclusion that it was not simply under Act 150 but in the entire process of reorganization from Act 561 on that the violation occurred.

(8) Student population of the New District would be 9,132 in 1981, which exceeds the minimum of 4,000 students mandated for merged districts under the statutory and regulatory guidelines of the Commonwealth of Pennsylvania.

(9) Student enrollment in all of the merged districts has been declining at a rate exceeding 35% in the past ten years, and from the student population figures in grades from kindergarten to 12th grade may be expected to decline at a comparable rate in the next eight years, all of which indicates a need for consolidation to achieve educational efficiency and economy.

(10) All of the merged districts have excess capacity, in most cases substantial, at all instructional levels, making the excess capacity for the New District 40%. This will increase as the student population continues to decline. This excess capacity could be greatly reduced by the merging of these districts, the merging of student population, the discontinuance of old buildings requiring extensive repairs, allowing for a better organized comprehensive educational program without additional cost, and the possibility of very substantial savings in costs, as well as achieving desegregation.

(11) The New District will be strongly interconnected by available transportation arteries, and the relatively short distances between most parts of the district will minimize the time and mileage involved in any additional transportation needed.

(12) The existing transportation facilities of the merged districts, should be adequate to serve the transportation needs of the New District.

(13) Inasmuch as a substantial number of public school students in the present district are bussed, and because of the limited distances in the New District, it is

not contemplated that any large increase in the total mileage or number of students transported will result from the consolidation.

(14) The proposed New District will be financially viable, having a higher tax base per student than the state average, and higher than some of the present districts included.

Hoots VIII at 6-8; Appendix at 889a-891a.[15]

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[15] The district court also gave reasons for inclusion of each individual district in the new district.

(1) *General Braddock:* This district must be in any remedy because its intentional creation as a racially identifiable black school district constituted the constitutional violation found in this case. Its 64% black student population in a larger area where the surrounding districts vary from less than 1% to a maximum of 13% black makes it mandatory for inclusion. It has continued serious financial problems that make its future as a viable district uncertain.

(2) *Turtle Creek* is included because it is contiguous to the General Braddock area, and also contiguous to Churchill which is also included in the New District. It is racially identifiable as a white school district (98%), it is small in area (1.37 miles), and has a high density of pupils per square mile (920), it has significant unused building capacity, particularly in its high school, and has experienced dropping enrollment and faces a continuing decline. Its present 1,200 student population in the face of a state standard of 4,000 students required for an adequate educational program renders its future as a viable independent school district cloudy. It has adequate transportational connection with the rest of the New District. It has close community business and occupation ties with the General Braddock Area District and also with the Churchill Area. It faces the same economic problems as the General Braddock district.

(3) *Churchhill* is included because it is contiguous to General Braddock, as well as contiguous to Turtle Creek, Swissvale, and almost if not actually contiguous to Edgewood. It is identifiable as a 99.2% white school district. It has excess capacity in its facilities and declining enrollment. Its geographical position puts it in the heart of the New District, and its exclusion from the compact formation of the New District would

(Footnote continued on following page.)

46. In a recent statement of the proper role of an appellate court in reviewing the trial judge's exercise of his discretion, we stated that a judge abuses his discretion "only when the judicial action is arbitrary, fanciful, or unreasonable, or when improper standards, criteria, or procedures are used." *Evans v. Buchanan*, 555 F.2d at 378-79, *citing Lindy Bros. Builders, Inc. v. American Radiator and Standard Sanitary Corp.*, 540 F.2d 102, 115-16 (3d Cir. 1976) (en banc). Using this standard of review, we find that the district court did not abuse its discretion in fashioning its multidistrict remedy. Indeed, the district court's action fully complied with all applicable standards and was supported by more than enough evidence.

(Footnote continued from preceding page.)

make all of the consideration of geographical contiguity and compactness of the New District meaningless. Its economic strength would add financial stability to the new district.

(4) *Swissvale* is included because it is contiguous to the General Braddock Area District, as well as contiguous to Churchill and Edgewood in the New District, it is small in geographic area but with a high density of pupils per square mile (771), it is small in student population (1,757), below the minimum state standard requiring consolidation, and its student population. It has many connecting arteries of transportation with the rest of the New District. Its exclusion would result in a large vacuum between the other areas of the New District because of its central position in the configuration and its nexus of transportation arteries connecting other parties of the New District.

(5) *Edgewood* is included because it is identifiable as a white school district (98%) in a general area of composition of which is 17% black, and where the adjoining district, Swissvale is 13% black, its very small geographic size, (½ sq. mile), its high student population (731), which has declined and will continue to decline, and its substantial underutilization of facilities. It is close to many other schools in the New District, and has ready transportation access to the other areas included in the consolidation. We recognize that Edgewood was granted an exemption from the 4,000 minimum student population requirement after much litigation, but its student population has continued to decline. It is highly commendable that this district has been able to attract 100 tuition students from Pittsburgh and other districts to help fill the underutilized facilities, and that it is able to receive

(Footnote continued on following page.)

CONCLUSION

47. For the foregoing reasons, the judgments of the district court will be affirmed.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

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$1,000 or $1,200 per tuition student in this process, bringing substantial additional revenue to the district. However, it is possible for Edgewood to educate these additional students at a figure much less than the average cost of education per pupil because of the economic law of marginal cost, no increase in operating costs is involved in the utilization of the empty classroom seats. However, in so doing Edgewood has entered the business of private education of its own residents. This is contrary to the Commonwealth's school district reorganization policy. Edgewood's inclusion rounds out the compact shape of the district, and adds financial stability to the new District.

All of these districts are properly subject segregation of the General Braddock Area School District because of their involvement in the violations which led to the creation of the General Braddock Area School District as set forth in our Opinion of March 5, 1981.

Appendix at 892a-895a.

The 1980-81 percentages of black enrollment in the New School District's constituent parts are helpful in understanding the desegregative purpose and effect of the district court remedy.

School District	1980 1981 Enrollment	Black	% Black
Churchill	3,342	27	.8%
Edgewood	731	16	2.2%
Gen. Braddock	2,042	1,279	62.6%
Swissvale	1,757	223	12.7%
Turtle Creek	1,260	24	1.9%
Total	9,132	1,569	17.2%

Appendix at 3233a.

APPENDIX B-1

Dorothy Hoots, individually and as mother of her children Janelle Hoots and Jamie Hoots, et al,

Plaintiffs,

v.

Commonwealth of Pennsylvania et al,

Defendants.

Civ. A. No. 71-538.

UNITED STATES DISTRICT COURT,
W. D. Pennsylvania.

Dec. 8, 1971.

Proceedings on motions to dismiss action attacking school district reorganization plan. The District Court, Weber, J., held that allegations of deliberate creation of racially segregated school district stated cause of action against state and various school officials, and that district court had jurisdiction over action against state and various school officials by plaintiffs who claimed defendants intentionally and knowingly created racially segregated school districts.

Motion denied.

R. Stanton Wettick, Jr., Neighborhood Legal Services, Pittsburgh, Pa., for plaintiffs.

Alfred C. Maiello, Pittsburgh, Pa., for Hallenberg, Allegheny City Board of School Directors and Pennsylvania State Board of Education, and W. Deming Lewis.

Frederick N. Frank, Asst. Atty Gen. of Commonwealth of Pennsylvania, Lee A. Donaldson, Jr., Pittsburgh, Pa., for Allegheny Intermediate Unit and Hallenberg.

OPINION

WEBER, *District Judge.*

Plaintiffs' Complaint contains allegations that:

(a) In preparing and adopting the school reorganization plans defendants intentionally and knowingly created racially segregated school district.

(b) In preparing and adopting the school reorganization plan the defendants failed to take steps to eliminate racial imbalance.

(c) In preparing and adopting the school reorganization plans the defendants failed to consider and make findings with respect to the racial characteristics of the new districts which they were creating.

(d) In preparing and adopting the school reorganization plan the defendants compelled the formation of an economically deprived school district which does not have the resources to provide education opportunities commensurate with the adjoining school districts and thus deprives plaintiffs of equal educational opportunities.

All defendants filed motions to dismiss but that of the Commonwealth of Pennsylvania has been withdrawn.

The remaining defendants allege in support of their motions:

1. The Complaint fails to state a cause of action.

[1] We have no doubt that the allegations of deliberate creation of a racially segregated school district state a cause of action, and that the remaining allegations are ancillary and supportive of this claim. Brown v. Board of Education, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 [1954]; Taylor v. Board of Education of City School District of New Rochelle, 294 F.2d 36 [2nd Cir., 1961]; Brewer v. School Board of City of Norfolk, 397 F.2d 37 [4th Cir., 1968].

[2] While defendants argue that plaintiffs' complaint does not contain a short simple statement of the cause of action, we do not believe that it is subject to dismissal because it pleads so much material that is evidentiary.

2. The corporate parties defendant, being political subdivisions of the Commonwealth are not "persons" subject to suit under the Civil Rights Act and are not proper parties defendant.

[3, 4] While the right to maintain suit for monetary damages against municipal corporations or political subdivisions has been denied under the Civil Rights Acts this denial has been limited to relief for monetary damages and has not been applied where the relief sought is injunctive in nature. See: Service Employees International Union A.F.L.-C.I.O. v. County of Butler, 306 F Supp. 1080 [W.D.Pa., 1969].

Moreover, this complaint avers that the suit is brought for injunctive relief to redress a deprivation of a right granted by the Fourteenth Amendment to the Constitution of the United States. As was recently stated by the Court of Appeals for this circuit:

> "While the Civil Rights law is rightfully stressed in the complaint, violation of the Fifth, Sixth and especially the Fourteenth Amendments are firmly a part of plaintiffs' cause and are never discarded. The language of the complaint could have perhaps been sharper in spots but that is no dispositive Federal practice error. As it stands the complaint makes the clear charge that John Scher was not accorded due process under the Fifth, Sixth and Fourteenth Amendments of the United States Constitution." (p. 744.) Scher v. Board of Education of Town of West Orange, 424 F.2d 741 [3rd Cir., 1970].

As cited in the above opinion:

> " 'A case brought under the Civil Rights Act should not be dismissed at the pleading stage unless it appears to a certainty that the plaintiff would be entitled to no relief

under any state of facts which could be proved in support of his claim.' Holmes v. N. Y. C. Housing Authority, 2 Cir., 398 F.2d 262, 265."

Broadly stated, we have a case arising under the Constitution of the United States, over which the United States District Courts have original jurisdiction under 28 U.S.C. § 1331(a).

3. The separate defendants raise individual defenses as to the grounds of liability asserted against them dependent upon the nature and character of their particular individual or corporate functions.

[5] But the complaint alleges acts by each of the defendants, either as corporate bodies or as individuals which participated in or led to the formation of the school district under attack. This allegation is sufficient to hold each party as a defendant in the suit until such time as evidence is produced which relieves that particular defendant from providing the action to secure the injunctive relief sought.

[6] In particular, the Allegheny County School Board alleges that it no longer exists. However, we are in no position at this time to determine whether any liability may be imposed for actions allegedly taken during the period of its corporate existence. A corporate body may have a continued responsibility after its functions have been transferred.

4. The complaint fails to name necessary parties-defendants.

[7] Defendants aver that the complaint fails to join as necessary parties either the adjoining school districts created by the reorganization plan, which might be affected by any relief granted, or the General Braddock Area School District which is the reorganized entity of which plaintiffs complain. Defendants reply that these school districts have no rights in or property interest in their existing boundaries. They were created without

their own assent, and they may be altered similarly. While these districts might intervene in this action under Fed.R. of Civ.P. 24 if they so desire, the court does not find their absence from this action as a practical matter impairs their ability to protect such interests as they have.

The court takes note from the pleadings that prior state court proceedings were instituted by the individual school boards involved in this reorganization in which they raised objections which were dismissed in the state courts. The constitutional issues now raised were not raised in those state court proceedings.

[8] We have considered all of the objections raised and find none of them sufficient to require dismissal of this complaint. The general rule applicable to all of such objections is that a complaint should not be dismissed unless it appears to a certainty that plaintiff would not be entitled to relief under any set of facts which could be proved in support of his claim. Frederick Hart & Co. Inc. v. Recordgraph Corp., 169 F.2d 580 [3rd Cir., 1953].

APPENDIX B-2

Dorothy Hoots, Individually and as mother of her children Janelle Hoots and Jamie Hoots, et al.,
Plaintiffs,

v.

Commonwealth of Pe sylvania et al.,
Defendants.

Civ. A. No. 71-538.

UNITED STATES DISTRICT COURT
W. D. Pennsylvania.

May 15, 1973.

Class action under Civil Rights Act by black students and parents who contended that residents of three boroughs had been deprived of rights, privileges and immunities guaranteed them by laws and Constitution of United States by being forced to attend and send their children to schools in racially segregated school district created by actions of defendant school authorities in preparing, approving and adopting plans of reorganization and consolidation of school districts in county. The District Court, Weber, J., held that evidence established that in adopting the plan the defendants had refused to give consideration to foreseeable and avoidable adverse educational or racial effects that could result from the concentration of black pupils within the new school district and that they knew or should have known that they were creating racially segregated district. The Court also held that the natural, foreseeable and racial effect of combining the districts into single school district was to perpetuate, exacerbate and maximize segregation of school pupils in violation of Fourteenth Amendment.

Judgment for plaintiffs.

See also, D.C., 334 F.Supp. 820.

1. Civil Rights 13.13(3)

In class action under Civil Rights Act by black students and parents who contended that residents of three boroughs had been deprived of constitutional rights by being forced to attend and send their children to racially segregated school district created by county board of school directors, State Board of Education and others, evidence established that creation of the district was an unstable influence on public school populations of the three boroughs and would cause increasing number of white students to leave the public schools of the boroughs. 28 U.S.C.A. §§ 1331(a), 1343 (3, 4), 2201, 2202; 42 U.S.C.A. §§ 1983, 1988; U.S.C.A. Const. Amend. 14; P.S.Pa.Const. art. 3, § 14; 24 P.S.Pa. §§ 2-281 et seq., 2-282, 2-283, 2-290 et seq., 2-292, 2-293, 2-400.1 et seq., 2400.2, 2400.3.

2. Schools and School Districts 13

In establishing boundary lines for school districts racial composition of student body of proposed school district is an important factor to be considered to maximize social and educational benefits which accrue from attending a racially integrated school system and to minimize foreseeable and avoidable adverse social and educational effects which result from attending racially segregated schools. U.S.C.A.Const. Amend. 14.

3. Civil Rights 13.13(3)

In class action under Civil Rights Act by black students and parents who contended that residents of three boroughs had been deprived of constitutional rights by being forced to attend and send their children to schools in racially segregated district created by defendant school officials, evidence established that defendants had refused to give consideration to foreseeable and avoidable adverse educational and racial effects that could result from concentration of black pupils within new district and knew or should have known that they were

creating a racially segregated school district as of date they proposed and approved new school district. 28 U.S.C.A. §§ 1331(a), 1343(3, 4), 2201, 2202; 42 U.S.C.A. §§ 1983, 1988; U.S.C.A.Const. Amend. 14; P.S.Pa.Const. art. 3, § 14; 24 P.S.Pa. §§ 2-281 et seq., 2-282, 2-283, [808] 2-290 et seq., 2-292, 2-293, 2400.1 et seq., 2400.2, 24003.3.

4. Civil Rights 13.13(3)

In class action under Civil Rights Act by black students and parents who contended that residents of three boroughs had been deprived of rights by being forced to attend or to send their children to schools in racially segregated school district created by defendant school boards, evidence established that defendants' plan disregarded State Board standards for approval of administrative units under policies of Department of Public Instruction and Human Relations Commission of Pennsylvania and disregarded recognized educational standards in adopting plan combining the boroughs into one district. 28 U.S.C.A. §§ 1331(a), 1343(3, 4), 2201, 2202; 42 U.S.C.A. §§ 1983, 1988; U.S.C.A. Const. Amend. 14; P.S.Pa.Const. art. 3, § 14; 24 P.S.Pa. §§ 2-281 et seq., 2-282, 2-283, 2-290 et seq., 2-292, 2-293, 2400.1 et seq., 2400.2, 2400.3.

5. Civil Rights 13.13(3)

In class action under Civil Rights Act by black students and parents who contended that residents of three boroughs had been deprived of rights by being forced to attend or send their children to schools in racially segregated district created by defendant school boards, evidence established that boards had built on pattern of residential segregation with foreseeable inevitable effect of maintaining, perpetuating, exacerbating, maximizing and otherwise imposing racial segregation in public schools. 28 U.S.C.A. §§ 1331(a), 1343(3, 4), 2201, 2202; 42 U.S.C.A. §§ 1983, 1988; U.S.C.A.Const. Amend. 14; P.S.Pa.Const. art. 3, § 14; 24 P.S.Pa §§ 2-281 et seq., 2-282, 2-283, 2-290 et seq., 2-292, 2-293, 2400.1 et seq., 2400.2, 2400.3.

6. Civil Rights 13.13(3)

In class action under Civil Rights Act by black students and parents who contended that residents of three boroughs had been deprived of rights by being forced to attend and send their children to schools in racially segregated district, evidence established that defendant school authorities devised plan combining the boroughs to satisfy desires of as many of surrounding municipalities as possible to be placed in district which did not include two of the boroughs. 28 U.S.C.A. §§ 1331(a), 1343(3, 4), 2201, 2202; 42 U.S.C.A. §§ 1983, 1988; U.S.C.A.Const. amend. 14; P.S.Pa.Const. art. 3, § 14; 24 P.S.Pa. §§ 2-281 et seq., 2-282, 2-283, 2-290 et seq., 2-292, 2-293, 2400.1 et seq., 2400.2, 2400.3.

7. Civil Rights 13.13

In class action under Civil Rights Act by black students and parents who contended that residents of three boroughs had been deprived of rights by being forced to attend and to send their children to schools in racially segregated district, evidence established that race was a factor, at least indirectly, in formation of the school district and that the school district boundaries were not rationally related to any legitimate purpose and did not promote any valid state interest. 28 U.S.C.A. §§ 1331(a), 1343(3, 4), 2201, 2202; 42 U.S.C.A. §§ 1983, 1988; U.S.C.A.Const. Amend. 14; P.S.Pa.Const. art. 3, § 14; 24 P.S.Pa. §§ 2-281 et seq., 2-282, 2-283, 2-290 et seq., 2-292, 2-293, 2400.1 et seq., 2400.2, 2400.3.

8. Federal Civil Procedure 219

With respect to action challenging composition of school district created by combining three boroughs, joinder of surrounding school districts was not required by federal rule, where surrounding school districts had no legal right to have their existing boundaries maintained so that consequently they had no legal interest which could be affected by outcome of

litigation. 28 U.S.C.A. §§ 1331(a), 1343(3, 4), 2201, 2202; 42 U.S.C.A. §§ 1983, 1988; U.S.C.A.Const. Amend. 14; P.S.Pa.Const. art. 3, § 14; 24 P.S.Pa. §§ 2-281 et seq., 2-282, 2-283, 2-290 et seq., 2-292, 2-293, 2400.1 et seq., 2400.2, 2400.3; Fed.Rules Civ.Proc. rules 19, 19(a), 28 U.S.C.A.

[809] **9. Schools and School Districts 36**

Under Pennsylvania law, power to draw school district boundaries rests solely with Commonwealth and State Board of Education and local school districts have no power or control over their boundaries which can be altered at anytime by Commonwealth. 24 P.S.Pa. §§ 2-281 et seq., 2-282, 2-283, 2-290 et seq., 2-291 to 2-293, 2400.1 et seq., 2400.2, 2400.3.

10. Federal Civil Procedure 119

Fact that school districts surrounding challenged district might be concerned with results of litigation and even be affected by it did not require their joinder under Federal Rule. Fed. Rules Civ.Proc. rules 19, 19(a), 28 U.S.C.A.

11. Constitutional Law 220

A violation of Fourteenth Amendment has occurred when public school authorities have made educational policy decisions based wholly or in part on considerations of race of students and which contribute to increasing racial segregation in public schools. U.S.C.A. Const. Amend 14.

12. Constitutional Law 220

School authorities may not, consistent with Fourteenth Amendment, maintain segregated schools or permit educational choices contributing to development and growth of segregated schools because of community sentiment or wishes of majority of voters. U.S.C.A. Const. Amend. 14.

13. Schools and School Districts 13

School authorities are accountable for the natural, probable and foreseeable consequences of their policies and practices and where racially identifiable schools are result of such policies, school authorities bear burden of showing that such policies are based on educationally required, nonracial considerations. U.S.C.A.Const. Amend. 14.

14. Constitutional Law 220

County and State Boards acted contrary to Fourteenth Amendment by selecting school district boundaries for portion of county conforming to and built upon patterns of residential racial segregation in that area of county. 28 U.S.C.A. §§ 1331(a), 1343(3, 4), 2201, 2202; 42 U.S.C.A. §§ 1983, 1988; U.S.C.A.Const. Amend. 14; P.S.Pa.Const. art. 3, § 14; 24 P.S.Pa. §§ 2-281 et seq., 2-282, 2-283, 2-290 et seq., 2-292, 2-293, 2400.1 et seq., 2400.2, 2400.3.

15. Constitutional Law 220

When natural and foreseeable consequences of actions taken by school authorities are to preserve racial segregation within public schools or to hamper its removal, such actions violate Fourteenth Amendment. U.S.C.A.Const. Amend. 14.

16. Constitutional Law 220

Whether natural, foreseeable and actual effect of combining three boroughs into single school district was to perpetuate, exacerbate and maximize segregation of school pupils, the combining constituted an act of de jure discrimination in violation of Fourteenth Amendment. 28 U.S.C.A. §§ 1331(a), 1343(3, 4), 2201, 2202; 42 U.S.C.A. §§ 1983, 1988; U.S.C.A.Const. Amend. 14; P.S.Pa. Const. art. 3, § 14; 24 P.S.Pa. §§ 2-281 et seq., 2-282, 2-283, 2-290 et seq., 2-292 2-293, 2400.1 et seq., 2400.2, 2400.3.

17. Schools and School Districts 13

While state may have no affirmative duty to eliminate public school segregation when it has done nothing to create it, nevertheless when it seeks change, it must proceed in fashion that will lessen previously existing school segregation. U.S.C.A.Const. Amend. 14.

18. Schools and School Districts 13

Refusal of State Board of Education and county board of school directors to consider racial criteria in adopting plan of organization of administrative units pursuant to statute constituted an explicit racial classification in that educational matters related to racial criteria were treated differently from education[810]al matters related to other criteria. 28 U.S.C.A. §§ 1331(a), 1343(3, 4), 2201, 2202; 42 U.S.C.A. §§ 1983, 1988; U.S.C.A.Const. Amend. 14; P.S.Pa.Const. art. 3, § 14; 24 P.S.Pa. §§ 2-281 et seq., 2-282, 2-283, 2-290 et seq., 2-292, 2-293, 2400.1 et seq., 2400.2, 2400.3.

19. Constitutional Law 215

Racial classifications are constitutionally suspect and will be upheld only if absolutely necessary to accomplishment of permissible state policy. U.S.C.A.Const. Amend. 14.

20. Courts 263(1)

Where violation of Fourteenth Amendment's prohibition against racial discrimination was found in creation of school district, federal district court had continuing jurisdiction of action for all purposes, including granting of effective relief. 28 U.S.C.A. §§ 1331(a), 1343(3, 4), 2201, 2202; 42 U.S.C.A. §§ 1983, 1988; U.S.C.A.Const. Amend. 14; P.S.Pa.Const. art. 3, § 14; 24 P.S.Pa. §§ 2-281 et seq., 2-282, 2-283, 2-290 et seq., 2-292, 2-293, 2400.1 et seq., 2400.2, 2400.3.

21. Schools and School Districts 13

Where there was unconstitutional school segregation, constitutional obligation of school authorities was at the earliest possible time to adopt and implement an educationally sound, practicable plan of desegregation that promised realistically to achieve then and hereafter the greatest possible degree of actual school desegregation. U.S.C.A.Const. Amend. 14.

22. Schools and School Districts 13

If school authorities failed to remedy unconstitutional school segregation, or were unable because of circumstances to fulfill any part of obligation promptly and fully to do so, federal district court had broad equity power and duty to insure that demonstrable progress be made, that schedule for planning be adopted forthwith and that necessary planning be specifically ordered and immediately undertaken in order that constitutionally adequate plan might be fashioned and implemented as soon as possible. U.S.C.A.Const. Amend. 14.

R. Stanton Wettick, Jr., Neighborhood Legal Services, Pittsburgh, Pa., for plaintiffs.

Burton Morris, Deputy Atty. Gen., Harrisburg, Pa., Alfred C. Maiello, Thomas M. Rutter, Jr., Pittsburgh, Pa., for defendants.

OPINION

WEBER, *District Judge.*

INTRODUCTION

This is a suit under the federal Civil Rights Act in which plaintiffs, as representatives of a class, allege that residents of the Borough of Braddock, North Braddock and Rankin, in Allegheny County, Pennsylvania, have been deprived of rights, privileges and immunities guaranteed them by the laws and Constitution of the United States by being forced to attend and send their children to a racially segregated school district created by the actions of the various defendants in preparing, approving and adopting plans of reorganization and consolidation of school districts in Allegheny County, particularly that creating the General Braddock Area School District, known as Administrative Unit No. 16, within whose boundaries these plaintiffs reside, and the approval of reorganization of surrounding school districts made at about the same time.

A great many of the factual issues in this case were resolved by agreement and stipulation. The statistical data submitted into evidence of the trial was received largely without objection. The defendants submitted two documents as exhibits but offered no testimony. As a result we find the facts to be almost entirely in accord with those findings proposed by plaintiffs' counsel after the close of the evidence. The findings are sufficiently detailed so as to allow us to proceed without a further narrative account of the background of this litigation.

FINDINGS OF FACT

A. *Parties*

1. Plaintiffs include Addrallace Knight and Barbara Smith.

2. Plaintiff Addrallace Knight is a black woman who has resided in the Borough of Braddock, Pennsylvania, for 20 years and is the mother of three children presently enrolled in the public schools of the General Braddock Area School District in grades 2, 4 and 12, of three children formerly enrolled and still eligible to be enrolled in the public schools of the General Braddock School District, and of two children in college who graduated from the School Districts of Braddock and the General Braddock Area, respectively.[1] T. 2, T. 30.

3. Plaintiff Barbara Smith is a black woman who has resided in the Borough of Braddock for 28 years and is the mother of children enrolled in the public schools of the General Braddock Area School District in grades 3, 4, 5, 9, 10 and 11. T. 63, 64.

4. Plaintiffs Addrallace Knight and Barbara Smith instituted this suit to alter the boundaries of the General Braddock Area School District. T. 30, 63.

5. Named Plaintiffs bring the suit as a class action on behalf of all parents and children residing in the boroughs of Braddock, North Braddock and Rankin. Named Plaintiffs' claims are typical of the claims of the class and named Plaintiffs will fairly and adequately protect the interests of the class. T. 40, 46, 100, 101.

6. Defendant Commonwealth of Pennsylvania has the duty under Article III, Section 14 of the Pennsylvania Constitution, P.S., to maintain and support a thorough and efficient

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[1] "T." ____ refers to the page of the Transcript of Trial.

public school system. (Paragraph 35 of Plaintiffs' Complaint, Admitted.)

7. Defendant Commonwealth of Pennsylvania has the ultimate power, authority and responsibility to create school districts and to establish and alter boundaries of the areas served by said school districts. (Paragraph 36 of Plaintiffs' Complaint, Admitted.)

8. Defendant Pennsylvania State Board of Education ["State Board"] is a state administrative board charged with the general supervision and control of the educational interests of the Commonwealth of Pennsylvania, and Defendant W. Deming Lewis is the Chairman of that Board. (Paragraphs 33 and 34 of Plaintiffs' Complaint, Admitted.)

9. Defendant Allegheny Intermediate Unit Board of School Directors is an administrative body which became operative as of July 1, 1971 and is charged with providing the essential services formally provided by the Allegheny County Board of School Directors ["County Board"] and with the administration of the program of services of Intermediate Unit 3 comprising all school districts in the County of Allegheny outside of the City of Pittsburgh, and Defendant Edward X. Hallenberg is the President of such Board. (Paragraphs 38(b) and 38(c) of Plaintiffs' Complaint, Admitted.)

B. *School Reorganization Legislation and Standards.*

10. During the 1960's the Pennsylvania Legislature on three occasions enacted legislation to reorganize the administrative units (i. e. school districts) in Pennsylvania's public school systems.

(a) the first Act—the Act of September 12, 1961, P.L. 1283, No. 561, 24 P.S. § 2-281 et seq. (Act 561)—directed each county board of school directors to prepare on or be[illegible]

January 1, 1963 a plan of organization of administrative units for the County for review by the State Council of Education. 24 P.S. §§ 2-282, 2-283.[2] S. 1.

(b) Act 561 was superseded by the Act of August 8, 1963, P.L. 564, No. 299, 24 P.S. § 2-290 et seq. (Act 299). [812] Act 299 directed each county board of school directors to prepare on or before July 1, 1964 a plan of organization of administrative units for the county and directed the State Council of Basic Education to review organization plans prepared by the county boards and to approve such plans as it deemed wise in the best interest of the educational system of the Commonwealth, provided that these plans met certain requirements specified in Act 299. 24 P.S. §§ 2-292, 2-293. S. 2. In preparing reorganization plans pursuant to Act 299, the county boards were not bound by any proposals contained in reorganization plans prepared pursuant to Act 561, 24 P.S. § 2-292. In dealing with school districts which had previously entered into a written agreement for the establishment of a joint school or department, however, the county boards were prohibited from proposing any administrative units which in whole or in part comprised less than all of the school districts joined by such agreement. 24 P.S. § 2-292.

(c) Act 299 was superseded by the Act of July 8, 1968, P.L. 299, No. 150, 24 P.S. § 2400.1 et seq. (Act 150). Act 150 directed each county board of education to prepare within 90 days a plan of organization of administrative units limited to those school districts within the county which were not in an administrative unit established as a school district under Act 299. 24 P.S. § 2400.2. S. 14.

11. Acts 299 and 150 both provided for the plan of organization of administrative units to conform to standards for approval of administrative units adopted by the State Board

[2] The reference to "S" ____ means the paragraph of the Stipulation of Facts, Ex. 61 of the record.

and directed the State Board to prepare such standards, taking into account the following factors: topography, pupil population, community characteristics, transportation of pupils, use of existing buildings, existing administrative units, potential population changes and the capability of providing a comprehensive plan of education. 24 P.S. §§ 2400.1 and 2400.2; 24 P.S. §§ 2-291 and 2-292. Both Acts also provided that no plan of organization of administrative units should include any proposed school district with a pupil population of less than 4000 unless the factors listed above were considered by the State Board (or Council of Basic Education) as requiring approval of a plan in which any district contained a pupil population of less than 4000. 24 P.S. § 2400.3, 24 P.S. § 2-293.

12. Pursuant to the above provisions of Acts 299 and 150, the State Board adopted Standards for Approval of Administrative Units. These Standards, *inter alia* provided that:

> (a) An administrative unit shall make available an educational program and educational opportunities to meet the varying needs, aptitudes, abilities, and interests of individuals residing in the administrative unit.
>
> (b) Consideration should be given to whether a geographic area has developed the characteristics of a community. Community, as used here, includes one or more municipalities and the surrounding territory from where people came for business, social, recreational, fraternal or similar reasons. Neither race or religion shall be a factor in determining administrative unit boundaries and differences in the social and economic level of the population shall not be a basis to determine these boundaries.
>
> A letter from the Superintendent of the Department of Public Instruction advised the County Boards, including the Allegheny County Board, that the intent of the language of the last sentence of the above paragraph was to prevent de jure segregation through the fixing of school

district boundaries and that the language was not to be construed to permit de facto segregation on the basis of race, religion or national origin which is by law prohibited. Exhibit 40, T. 271-276.

(c) An administrative unit shall utilize existing buildings to the maximum extent practical avoiding unnecessary new construction where possible.

(d) Pupil population changes may be considered in the planning of administrative units where the changes are supported by reliable studies of area development showing past pupil population trends and future projections based on recognized statistical methods.

(e) Consideration shall be given to the capability of providing a comprehensive program of education which shall mean the ability to educate and train each child within his capacity to the extent demanded by the immediate requirements of his growth and his relationship to the strengthening of this Commonwealth and nation, and shall include, but not be limited to, wealth per pupil, qualifications of professional staff, enrollment and diversification of curriculum.

Exhibits 12, 60.

C. *School Districts Established by the State and County Boards*

13. In the central eastern area of Allegheny County, east of the City of Pittsburgh and north of the Monongahela River, the County and State Boards established the General Braddock Area School District; the School Districts of Turtle Creek, Swissvale Area, Churchill Area and East Allegheny which border on the General Braddock Area School District; and the Edgewood School District which is situated within approximately one mile of the General Braddock Area School District. Exhibits 59, 13, 4, 10.

14. The General Braddock Area School District came into being on July 1, 1971 and serves the area consisting of the geographic limits of the Boroughs of Braddock, North Braddock and Rankin. This School District composed of Braddock, North Braddock and Rankin was proposed in the organization plan adopted by the County Board pursuant to Act 150 on October 7, 1968 and was approved by the State Board on May 9, 1969. Prior to July 1, 1971, the School Districts of Braddock, North Braddock and Rankin served the Boroughs of Braddock, North Braddock and Rankin, respectively. S. 15, 21, 24, 26; Ex. 10, 13, 37.

15. The Turtle Creek School District serves the area consisting of the geographic limits of the Boroughs of East Pittsburgh and Turtle Creek. This School District was established pursuant to Act 150. S. 15; Ex. 9, 10, 37.

16. The Swissvale Area School District serves the area consisting of the geographic limits of the boroughs of Braddock Hills and Swissvale. This School District was established pursuant to Act 150. S. 15; Ex. 9, 10, 37.

17. The Churchill Area School District serves the area consisting of the geographic limits of the municipalities of Chalfont, Churchill, Forest Hills and Wilkins. This School District was established pursuant to Act 299. S. 15; Ex. 4, 10, 13, 36.

18. The East Allegheny School District serves the area consisting of the geographic limits of the municipalities of East McKeesport, North Versailles, Wall and Wilmerding. This School District was established pursuant to Act 299. S. 15; Ex. 4, 10, 13, 36.

19. The Edgewood School District serves the area consisting of the geographic limits of the Borough of Edgewood. This School District was established pursuant to Act 150. S. 15; Ex. 9, 10, 13, 37.

D. *Characteristics of Braddock, North Braddock and Rankin.*

20. Braddock, North Braddock and Rankin are economically depressed, declining communities. T. 47, 48, 66, 120, 135-137.

21. The housing within these three municipalities is old and substandard. Ex. 23, 49; T. 50, 134-135.

22. The residents of these municipalities are poor and less educated. Ex. 20, 50, 51, 56.

23. The municipal taxes of these municipalities are higher than average. Ex. 25.

24. The recreational and shopping facilities within these three municipalities are extremely limited. T. 49-50, 65, 134, 135.

[814] 25. The populations of these three municipalities have been rapidly declining at an accelerated pace and becoming increasingly older. From 1930 to 1970 the combined populations of Braddock, North Braddock and Rankin declined from 44,067 to 23,335 and the median age of these populations increased from approximately 27 years in 1940 to approximately 35 years in 1970. Ex. 15, 16.

26. The Boroughs of Braddock, North Braddock and Rankin have no characteristics that will attract or retain persons who have the financial means and opportunity to live elsewhere. T. 47, 48, 64-66, 120, 220, 221, 225-228; Findings of Fact 20-25.

E. *Population Trends—Race*

27. The populations of Braddock, North Braddock and Rankin are becoming increasingly non-white at an accelerated rate. From 1930 to 1970 the percentages of the non-white

populations of Braddock, North Braddock and Rankin increased as follows: Braddock—11.54% to 36.33%; North Braddock—2.91% to 11.04%; Rankin—19.56% to 35.48%; and combined populations—9.7% to 24.7%. The largest increase in the non-white percentage of the combined populations of Braddock, North Braddock and Rankin has occurred in the last two decades as is shown in the table below which sets forth the increase in the percentage of non-white population for each of the past four decades:

	1930-1940	1940-1950	1950-1960	1960-1970
Braddock	.7%	4.0%	7.3%	12.8%
North Braddock	.2%	1.8%	2.4%	3.8%
Rankin	2.2%	7.3%	5.0%	1.4%
Combined[3]	.8%	3.7%	4.1%	6.4%

Ex. 15

28. The increase in the percentages of the non-white populations of Braddock, North Braddock and Rankin is attributable almost entirely to a declining white population within these municipalities. From 1930 to 1970 the white populations of these three boroughs decreased as follow:

	1930 White Population	1970 White Population	Loss
Braddock	17,096	5,527	11,569
North Braddock	16,290	9,641	6,649
Rankin	6,391	2,462	3,929
Combined Population	39,777	17,630	22,147

Ex. 15

The greatest portion of the loss in the white populations of these municipalities has occurred in the last two decades as shown in the table below which sets forth the average yearly

[3] This shows the increase in the non-white percentage of the combined populations of Braddock, North Braddock and Rankin.

decline in the white population for each of the past four decades:

Average Yearly Decline

	1930-1940	1940-1950	1950-1960	1960-1970
Braddock	101	228	438	399
North Braddock	109	120	176	260
Rankin	55	92	152	94
Combined Loss	265	440	766	744

Ex. 15

29. Over the past four decades there has been an even greater increase in the non-white percentages of the public school populations of Braddock, North Braddock and Rankin. From 1930 to 1972 the non-white percentages of the public school populations of these municipalities increased as follows:

% of Non-White Enrollment

	1930	1960	1970	1972
Braddock	8%	41%	72%	80%
North Braddock	.2%	.8%	16%	22%
Rankin	17%	34%	51%	57%
Combined	7.1%	23.7%	38.7%	44.5%

Ex. 18

Yearly Increase in Non-White Enrollment

	1930-1960	1960-1970	1970-1972
Braddock	1.1%	3.1%	4%
North Braddock	.2%	.8%	3%
Rankin	.6%	1.7%	3%
Combined	.5%	1.5%	3%

Ex. 18

30. This substantial increase in the non-white percentages of the public school populations of Braddock, North [815] Braddock and Rankin is attributable almost entirely to a steady decline in the white public school populations of Braddock, North Braddock and Rankin over the past 42 years:[4]

White Public School Populations

	1930	1960	1970	1972
Braddock	3,085	1,096	332	198
North Braddock	4,400	2,481	1,955	1,576
Rankin	1,617	685	398	295
Combined	9,102	4,262	2,685	2,069

Ex. 18

Average Yearly Decline in White Public School Populations

	1930-1960	1960-1970	1970-1972
Braddock	66	76	67
North Braddock	64	53	190
Rankin	32	29	52
Combined	162	158	309

Ex. 18

31. This Court relies on the uncontradicted testimony of expert witness John A. Finger that there is no basis for believing that the characteristics which caused the decline in the white populations of Braddock, North Braddock and Rankin over the past years have changed; that while all white families may not move out, new white families will not move in and there will be fewer and fewer young white children; that it is

[4] From 1930 to 1972 the black public school populations of Braddock, North Braddock and Rankin increased from 696 to 1656.

extremely likely that these municipalities have reached the tipping point of becoming primarily a black area; and that Braddock and Rankin will become 100% black or nearly so and North Braddock will develop the same characteristics unless remedial action is taken as to the General Braddock Area School District because of the relationship of school population to residential neighborhood stability.[8] T. 219-228.

[1] 32. This Court finds that the creation of the General Braddock Area School District is an unstable influence on the public school populations of Braddock, North Braddock and Rankin that will cause an increasing number of white students to leave the public schools of Braddock, North Braddock and Rankin.[8] T. 40, 104, 288.

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[8] This testimony is also supported by the data in Exhibit 16 which shows that the white populations of Braddock, North Braddock and Rankin are much older than the black populations of these municipalities; that the younger segments of the populations are becoming increasingly non-white; and that, in fact, the non-white percentage of the combined populations of these municipalities between the ages of 0-14 is twice as great as the non-white percentage of the combined populations over the age of 44.

[8] In its 1936 Underwriter's Manual the FHA recognized that the development of a neighborhood is strongly influenced by the type of schools:

> "If the children of people living in such an area are compelled to attend school where the majority or a goodly number of the pupils represent a far lower level of society or incompatible racial element, the neighborhood under consideration will prove far less stable and desirable than if this condition did not exist." Bradley v. School Board of City of Richmond, Virginia, D.C., 338 F. Supp. 67, at 215-216. Also see Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, at 20-21, 91 S.Ct. 1267, 28 L.Ed.2d 554.

Note also that in the last two years the annual decline in the white public school populations of Braddock, North Braddock and Rankin doubled primarily because in North Braddock (the source of 76% of General Braddock Area School District's white students) the annual

(Footnote continued on following page.)

33. On the basis of findings of fact 20 through 32, this court finds that there is every reason to believe that the white public school populations of Braddock, North Braddock and Rankin will continue to decline by at least the same number as over the past several years and that the enrollment of the General Braddock Area School District will be [816] almost entirely black within the next five to ten years.

F. *Comparison with Neighboring Municipalities.*

34. The area served by the General Braddock Area School District has perhaps the highest concentration of blacks of any area within Allegheny County served by a single school district. As of 1970 Braddock, Rankin and North Braddock ranked first, second and eleventh, respectively, of the 129 municipalities within the County in terms of their percentage of black residents. Ex. 14

35. This central eastern portion of Allegheny County is generally divided along racial lines. The black residents of this portion of the County are contained within Braddock, North Braddock and Rankin and largely excluded from other municipalities within the area. This is illustrated by the following table which sets forth the black populations as of 1970 for Braddock, North Braddock, Rankin and the other municipalities within the area:

(Footnote continued from preceding page.)

decline in white students increased from 53 to 190. See Finding of Fact 30.

Also see United States v. Board of School Commissioners, Indianapolis, Ind., D.C., 332 F.Supp. 655, at 676, where the Court said:

> "The undisputed evidence in this case ... is that when the percentage of Negro pupils in a given school approaches 40, more or less, the white exodus becomes accelerated and irreversible."

	Black	Total	% Black
Braddock	3139	8682	36.16
North Braddock	1194	10,838	11.02
Rankin	1351	3817	35.39
Chalfont	12	1370	.88
Churchill	5	4690	.11
East McKeesport	26	3233	.80
Braddock Hill	293	2494	11.75
East Pittsburgh	116	3006	3.85
Edgewood	66	5101	1.29
Forest Hills	26	9561	.27
North Versailles	1025	13,416	7.64
Swissvale	567	13,891	4.10
Turtle Creek	15	8,308	.18
Wall	32	1,265	2.53
Wilkins	49	8,479	.56
Wilmerding	94	3,218	2.92

36. Pervasive racial discrimination which restricts the housing opportunities of blacks in the eastern portion of Allegheny County is a factor which accounts for the concentration of blacks within Braddock, North Braddock and Rankin. T. 42-43, 70-77; Affidavits of Brock, Cox, DeCostro, Strader.

37. The percentage of non-white enrollment of the General Braddock Area School District is much greater than that of any of the surrounding school districts. As of 1971 the percentages of non-white enrollment of the General Braddock Area School District and surrounding school District were as follows:

General Braddock Area School District	44.98
Churchill	.78
Edgewood	6.08
East Allegheny	8.89
Turtle Creek	1.3
Swissvale	9.6

Ex. 17

38. The General Braddock Area School District also has a much greater non-white enrollment than almost every other school district within the entire county. As of 1971 of the 46 school districts operating within Allegheny County (excluding Pittsburgh)[7] only 15 districts had a non-white enrollment in excess of 5%, only eight districts had a non-white enrollment in excess of 10%, only 4 districts had a non-white enrollment in excess of 30%[8], and only two districts—Wilkinsburg and General Braddock Area—had a non-white enrollment in excess of 40%. Ex. 17

39. The school districts in the vicinity of Braddock and Rankin continually sought to avoid being included in a school district with Braddock and Rankin because of the high concentration of blacks within the Braddock and Rankin School Districts. These surrounding districts proposed to the County and [817] State Boards mergers that would include almost any

[7] Pittsburgh is excluded because for organization of administrative units and other purposes the jurisdiction of the County Board covers all Allegheny County school districts except Pittsburgh.

[8] Of the four districts with a non-white enrollment in excess of 20% (Wilkinsburg, General Braddock Area, Clairton and Duquesne), the General Braddock Area School District was the only newly created school district. The boundaries of the School Districts of Wilkinsburg, Clairton and Duquesne are identical to the municipal boundaries of these municipalities and these boundaries were not affected by school reorganization within Allegheny County. (Exhibit 13)

school districts in the vicinity other than Braddock and Rankin. S. 4, 7, 9, 10, 17, 18; Ex. 5, 7, 8; 35A (p. 11), 42, 46, 47; T. 82-85, 93-100, 107-108, 120-122.

40. The General Braddock Area School District is racially identifiable as a black school district. Findings of Fact 34-39; S. 17, 18; T. 40, 46, 84, 93-95, 98-100, 104, 246, 247, 268-272, 276.

G. *Alternatives to a school district of Braddock, North Braddock and Rankin.*

41. Braddock, North Braddock and Rankin are not geographically isolated; they are easily accessible to most other municipalities within this central eastern portion of the County; and they have not historically developed the characteristics of a single community (defined by the Standards for Approval of Administrative Units—Ex. 12—as one or more municipalities and the surrounding territory from which people come for business, social, recreational, fraternal or social reasons). Thus alternatives to a school district comprised of Braddock, North Braddock and Rankin were available to the County and State Boards. Ex. 8, 59; T. 45, 88, 116-119, 131, 133-134.

42. One such alternative was a school district composed of Braddock, North Braddock, Rankin, East Pittsburgh and Turtle Creek. Such a school district as of 1967 would have had an enrollment of 5894 of which approximately 27% would have been non-white. Ex. 17.

The plan of organization of administrative units prepared by the County Board pursuant to Act 299 proposed a school district composed of these five municipalities. The minutes of a meeting of the County Board which discussed this proposed school district state that all members of the Board agreed that this was a satisfactory unit and that this unit met the standards for pupil population, utilization of existing buildings and

capabilities of providing comprehensive education. Also a report prepared by the Department of Public Instruction described a unit consisting of these five municipalities as "a natural".[9] S. 3, Ex. 8, 45.

43. A second alternative was a school district composed of Braddock, North Braddock, Rankin, Braddock Hills and East Pittsburgh.

The plan of reorganization of administrative units prepared by the County Board pursuant to Act 561 proposed a school district composed of these five school districts. A report prepared by the County Board in connection with the preparation of this plan stated that a district composed of these five municipalities would make possible the placement of every pupil—grades 7, 8 and 9—in a bona fide junior high school and that all senior pupils could have an expanded high school program. S. 1, Ex. 35 (p. 10); T. 83-84.

44. A third alternative was one school district composed of Swissvale, Rankin, Braddock Hills and perhaps Edgewood and a second school district composed of Braddock North Braddock, Turtle Creek and East Pittsburgh. A school district composed of Swissvale, Rankin, Braddock Hills and Edgewood as of 1967 would have had an enrollment of 3940 of which approximately 14% would have been non-white and a school district composed of Braddock, North Braddock, Turtle Creek and East Pittsburgh would have had an enrollment of 5280 of which approximately 24% would have been non-white.[10] Ex. 17

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[9] None of these five municipalities was in a unit established pursuant to Act 299 so the provisions of Act 150 which protected established school districts did not preclude a district composed of these five municipalities. Ex. 4, 10.

[10] None of these municipalities was in a unit established pursuant to Act 299 so the provisions of Act 150 protecting established school districts did not preclude the Boards from proposing the alternative suggested in finding of fact 44.

All witnesses familiar with this area of Allegheny County testified that for geographic reasons alone, Rankin should be in the school district which included Swissvile rather than a school district which included Braddock. The feasibility of placing Rankin in the school district which included Swissvale is so obvious that William Rea, a member of the State Board who heard the appeal of the Rankin School District from the County Board's plan which combined Braddock, North Braddock and Rankin into one school district, asked if there was any way the State Board could find out why the County put Rankin with Braddock and North Braddock "rather than the logical geographical thing, looking at the map, of Swissvale because it seems to me that the State Board needs to have some reasons here." T. 88, 131, 134; Ex. 54 (p. 23); Ex. 59.

45. A review of the map of this central eastern area of Allegheny County indicates that at least from the standpoint of transportation, other alternatives (in addition to the three mentioned above) to a school district composed of Braddock, North Braddock and Rankin could also have been selected. Ex. 59, Ex. 11.

H. *Refusal to Properly Consider Race.*

[2] 46. On the basis of the uncontradicted testimony presented by plaintiffs' expert witnesses, this Court finds that in establishing boundary lines for school districts, the racial composition of the student body of the proposed school district is an important factor to be considered to maximize the social and educational benefits which accrue from attending a racially integrated school system and to minimize the foreseeable and avoidable adverse social and educational effects which result from attending racially segregated schools. T. 162, 163, 232-234, 264-5; Ex. 58, 41.

47. On the basis of the uncontradicted testimony presented by plaintiffs' expert witnesses, this court finds that there is no

educational or other valid justification for disregarding racial criteria in establishing school district boundary lines. T. 162-168, 234-239, 271-275.

[3] 48. In preparing and adopting the plan of organization of administrative units which combined Braddock, North Braddock and Rankin into one school district pursuant to Act 150, the County and State Boards refused to give consideration to the foreseeable and avoidable adverse educational and racial effects that could result from the concentration of black pupils within this proposed school district. S. 19, 23.

49. This court finds that if the County and State Boards had properly considered race in preparing and approving a plan of organization of administrative units for Allegheny County pursuant to Act 150, these Boards would not have approved a plan which combined Braddock, North Braddock and Rankin into a single school district. In support of this finding, this court relies on the uncontradicted testimony of plaintiffs' expert witnesses that had race been properly considered, for educational reasons alone the Boards would not have concentrated the black residents of this area within this one school system. T. 162, 166-168, 244, 268-271, 276-277.

50. This Court accepts the uncontradicted testimony of plaintiffs' expert witnesses that on the basis of the demographic data which was clearly available, the State and County Boards knew or should have known they were creating a racially segregated school district as of the dates they proposed and approved a school district composed of Braddock, North Braddock and Rankin. T. 219-224, 230-232, 251-253, 276-277.

Demographic data available to these Boards as of such dates included information on the racial composition of the public schools of Braddock, North Braddock and Rankin and surrounding school districts (S. 6, 17, 22, Ex. 47) as well as data of the U. S. Census Bureau and public schools of Braddock, North Braddock and Rankin showing the population

trends by race of the public school popu-[819]lations and general populations of Braddock, North Braddock, Rankin and surrounding areas. (See, for example, Exhibits 15, 16 and 18).

Merely by considering the data collected by the County Board and Department of Public Instruction showing the white and non-white enrollment in each school district within Allegheny County as of 1964 and 1967 (Exhibit 17), the County and State Boards should have known that a school district of Braddock, North Braddock and Rankin would be a racially segregated school district that would become increasingly non-white. As of 1967, Braddock, Rankin and North Braddock ranked 1, 2 and 7 of the 61 school districts in Allegheny County (excluding Pittsburgh) in terms of percent of non-white enrollment and, as the table below shows, were the only school districts within this central eastern portion of Allegheny County with a significant concentration of non-white students:

Percent of non-white students

	1964	1967
Braddock	56.69	63.84
North Braddock	14.22	19.62
Rankin	44.7	51.30
East Pittsburgh	14.15	6.08
Turtle Creek	0.00	0.00
Swissvale	5.5	9.91
Edgewood	0.00	0.00
Churchill	.17	0.41
East Allegheny	—	9.88

Ex. 17

51. The County and State Boards maximized racial segregation within the public schools of this central eastern portion of Allegheny County by creating a school district composed of Braddock, North Braddock and Rankin. As of the

dates on which the County Board prepared and State Board approved the combining of the school districts of Braddock, North Braddock and Rankin into a single school district, no other combination of school districts within this portion of Allegheny County would have created a school district (of at least 4,000 pupils as required by Act 150) with as large a percentage of non-white enrollment as the combination of Braddock, North Braddock and Rankin. See Ex. 17.

1. *The Boards' plan disregarded Standards for School Reorganization as well as recognized educational standards.*

[4] 52. The plan of organization of administrative units adopted by the County and State Boards pursuant to Act 150 for the central eastern portion of Allegheny County failed to meet many essential requirements of Act 150, the State Board Standards for Approval of Administrative Units ("State Board Standards"), policies of the Department of Public Instruction and Human Relations Commission of Pennsylvania, and recognized educational standards. T. 157-162, 235-241, 262-265, 268-272, 277-281. Examples of essential requests that weren't met include:

(a) Act 150 required that each proposed school district have a pupil population of at least 4000 (unless a smaller school district was required). See Finding of Fact 11. The plan adopted by the County and State Boards completely disregarded this requirement by combining the school districts of East Pittsburgh and Turtle Creek which had a 1967 combined enrollment of 1898[11], by combining the school districts of Braddock Hills and Swissvale which a 1967 combined enrollment of 1925 and by permitting to stand alone the school

[11] It is noted that as of 1964 the County Board recognized that a school district of Turtle Creek and East Pittsburgh would not comply with the state pupil population requirements and therefore it refused to consider such a school district. Ex. 45, 6. At that time Turtle Creek-East Pittsburgh public school population was 2234. (Ex. 36.)

district of Edgewood which had a 1967 pupil population of 928, Ex. 37; T. 159-161, 239-241. Even the school district of Braddock, North Braddock and Rankin violated the spirit of this requirement because as of 1967 it was obvious that the enrollment within these districts (which was slightly in excess of 4000) was declining [820] rapidly and that the pupil population of this district would stabilize at a population far below 4000.[18]

(b) The State Standards as well as recognized educational standards require creation of school districts capable of providing a comprehensive program of education. Finding of Fact 12e. Because of the concentration of non-white children from poor and educationally deprived homes within the district, the General Braddock Area School District did not meet this requirement according to uncontradicted testimony of plaintiffs' expert witnesses. T. 161, 162, 241-246, 277-281.

(c) Guidelines of the Department of Public Instruction and the Human Relations Commission of Pennsylvania in effect prior to the County Board's preparation of the plan of administrative units pursuant to Act 150 (as well as accepted educational standards) recognize the importance of the presence of children from varied backgrounds within every school building. Such policy specifically provides that any action which fosters racial segregation in the public schools is against the public interest and should not be taken by any public agency. Ex. 58, 41. T. 264, 265. The County and State Boards acted contrary to these guidelines (as well as the policy expressed in the letter from the Superintendent of the Department of Public Instruction stating that de facto segregation on the basis of race is by law prohibited—(see finding of fact 12b) by concentrating black children and children from poor, educationally deprived homes within one single school district. T. 158-159, 234-238, 241-246, 258-265, 268-276, 283-284.

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[18] State Board standards permitted consideration of population changes. See Findings of Fact 12a.

(d) The County and State Boards also ignored the State Board Standard requiring maximum utilization of existing buildings by separating East Pittsburgh from North Braddock because of North Braddock's need for school buildings situated within East Pittsburgh. Findings of Fact 12c. Ex. 6, 7, 45.

53. Alternatives to a school district composed of Braddock, North Braddock and Rankin were available that would have been more consistent with the provisions of Act 150, the State Board Standards for Approval of Administrative Units and recognized educational standards. Such alternatives include those set forth in findings of fact 42-44, T. 157-162, 241-242, 244-246.

54. In view of the availability of these alternatives, the decision of the County and State Boards to create a school district composed of Braddock, North Braddock and Rankin was contrary to recognized education standards, the provisions of Act 150, the Standards for Approval of Administrative Units of the State Board, and policies of the Department of Public Instruction and Human Relations Commission. T. 157-162, 241-242, 244-246.

55. These alternatives previously referred to that would have been more consistent with the provisions of Act 150, the Standards for Approval of Administrative Units of the State Board, recognized education standards and the policies of the Department of Public Instruction and Human Relations Commission would have permitted the black public school population of Braddock, North Braddock and Rankin to attend substantially more integrated public school systems. Ex. 17, Findings of Fact 42, 44, T. 158-162.

J. *General Conclusions*

[5] 56. On the basis of Findings of Fact 27 through 55 and the uncontradictory testimony of plaintiffs' expert witnesses, this Court finds that by combining Braddock, North

Braddock and Rankin into one school district, the County and State Boards created a racially segregated school district. T. 247, 276, 210-227, 246-247, 276-277, 262-271.

[821] 57. On the basis of Findings of Fact 20 through 55 this Court finds that the natural, foreseeable and actual effect of combining Braddock, North Braddock and Rankin into one school district was to perpetuate, exacerbate and maximize racial segregation within the public schools of this central eastern portion of Allegheny County.

58. On the basis of Findings of Fact 27 through 51 this Court finds that by combining the three municipalities within which most of the black population of the area resides into a single school district the County and State Boards built on the pattern of residential segregation within this central eastern portion of Allegheny County, the inevitable effect of which was to maintain, perpetuate, exacerbate, maximize and otherwise impose racial segregation in the public schools of this central eastern portion of the County.

[6] 59. On the basis of Findings of Fact 27 through 55 this Court finds that the County and State Boards devised this plan of organization of administrative units which combined Braddock, North Braddock and Rankin into one school district to satisfy the desires of as many of the surrounding municipalities as possible to be placed in a school district which did not include Braddock and Rankin. This Court can find no other explanation for the Boards' creating a school district composed of Braddock, North Braddock and Rankin and defendants have offered no explanation as to why this school district was created to refute the testimony of plaintiffs' expert witnesses that the creation of this school district cannot be justified under recognized educational standards, the provisions of Act 150 or the Standards for Approval promulgated by the State Board.

[7] 60. Because the State and County Boards in devising this plan of organization of administrative units for the central eastern portion of Allegheny County were influenced by the desires of the surrounding municipalities to avoid being placed in a school district with Braddock and Rankin because of the high concentration of blacks within these two municipalities, race was a factor, at least indirectly, in the formation of the school district composed of Braddock, North Braddock and Rankin.

61. The Record contains absolutely no evidence showing that the school district boundaries established in the County and State Boards' plan of organization of administrative units are rationally related to any legitimate purpose and this Court finds that such boundaries do not promote any valid state interest. T. 158-162, 239-242, 244-246, 277-281; Findings of Fact 20 through 55.

DISCUSSION—JOINDER OF NECESSARY PARTIES

The only issue of law seriously contested in these proceedings has been the necessity of joinder of the school districts surrounding the General Braddock Area School District.

Fed.R.Civ.P. 19(a) requires the joinder of a party (1) whose absence prevents the granting of complete relief to the present parties, and (2) whose interest is such that his absence may impair his ability to protect that interest or submit the present party to multiply or inconsistent obligations.

[8, 9] The absence of the surrounding school districts does not affect the complete relief available to existing parties. The power to draw school district boundaries rests solely with the Commonwealth of Pennsylvania and the Pennsylvania State Board of Education. Local school districts have no power or control over their own boundaries. They can be altered at any

time by the Commonwealth. The surrounding school districts have no legal right to have their existing boundaries maintained and consequently they have no legal interest under the provisions of Fed.R.Civ.P. 19 which can be affected by the outcome of this litigation.

[10] While surrounding school districts may be concerned with the results [822] of this litigation and even be affected by it, this does not require their joinder under Fed.R.Civ.P. 19.

In Griffin v. State Board of Education, 239 F.Supp. 560 [E.D.Va.1965] where public agencies were enjoined from paying tuition grants for use by private schools which practiced racial discrimination, it was held not necessary to join the private school's name. "The overriding answer is that no complaint is made against the schools themselves. The complaint is against the payers and not the ultimate recipients of the grant. It is the power to give, not the right to receive, which is in issue." (p. 566). Permissive intervention was allowed to such private schools in Poindexter v. Louisiana Financial Assistance Commission, 258 F.Supp. 158 (E.D.La.1966], aff'd, 389 U.S. 571, 88 S.Ct. 693, 19 L.Ed.2d 780 [1968], the trial court stating: "These schools are not necessary parties, as far as the constitutionality of the tuition grant system is concerned." (p. 167).

We may note that the surrounding school districts were aware of this suit. The Attorney General of the Commonwealth of Pennsylvania sent letters on May 19, 1972 to four surrounding school districts informing them of the action and enclosing a copy of the complaint. He advised them that if relief were granted the present boundaries of their districts would undoubtedly be changed. He urged their immediate intervention. (Ex. 54, T. 4.) Also, a week before trial the Attorney General sent telegrams advising them that he would again move to compel their joinder, and urging them to intervene. (T. 3-4.) None chose to act.

We do not overlook the possibility that the adjoining districts may be required to be joined at some further stage of the proceedings, if such are necessary under our retention of jurisdiction of this matter. We shall provide in our order that the Commonwealth and the State Board allow the adjoining districts to be heard on the matter of developing a plan of desegregation.

We have, therefore, denied defendants' motions based on failure to join a necessary party under Fed.R.Civ.P. 19 up to the present stage of the proceedings.

CONCLUSIONS OF LAW

1. This Court has jurisdiction over the parties and the subject matter of this action under 28 U.S.C. §§ 1331(a), 1343(3) and (4), 2201 and 2202; 42 U.S.C. §§ 1983 and 1988.

[11] 2. A violation of the Fourteenth Amendment has occurred when public school authorities have made educational policy decisions which were based wholly or in part on considerations of the race of students and which contributed to increasing racial segregation in the public schools. Kelly v. Guinn, 456 F.2d 100, 105-108 [9th Cir. 1972], petition for cert. filed, 41 U.S.L.W. 3114 [U. S. Sept. 12, 1972] [No. 72-341]; Davis v. School District of City of Pontiac, Inc., 443 F.2d 573 [6th Cir. 1971], cert. denied, 404 U.S. 913, 92 S. Ct. 233, 30 L.Ed.2d 186 [1971]; Spangler v. Pasadena City Board of Education, 311 F.Supp. 501, 521 [C.D.Cal. 1970], and cases cited therein.

[12] 3. School authorities may not, consistent with the Fourteenth Amendment, maintain segregated schools or permit educational choices contributing to the development and growth of segregated schools because of community sentiment or the wishes of a majority of voters. Bradley v. Milliken, [6th Cir. Dec. 8, 1972 slip opinion], aff'g 345 F. Supp. 914 [E.D.Mich.1972], same 338 F.Supp. 582, 593 [1972]; United States v. School District 151 of Cook County, Ill., 432 F.2d 1147 [7th Cir. 1970] aff'g 301 F.Supp. 201, 230 [N.D.Ill. 1969], cert. denied, 402 U.S. 943, 91 S.Ct. 1610, 29 L.Ed.2d 111 [1971] and cases cited therein; Johnson v. San Francisco Unified School District, 339 F.Supp. 1315, 1341 [N.D.Cal.1971] and cases cited therein; Spangler v. Pasadena City Board of Education, *supra*, 311 F.Supp. at 523 and cases cited therein.

[823] 4. School authorities are accountable for the natural, probable and foreseeable consequences of their policies and practices, and where racially identifiable schools are the

result of such policies, the school authorities bear the burden of showing that such policies are based on educationally required, non-racial considerations. Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 25-26, 91 S.Ct. 1267, 28 L.Ed.2d 554 [1971]; Bradley v. Milliken, *supra*, 338 F.Supp. at 592 and cases cited therein; Kelly v. Guinn, *supra*, 456 F.2d at 105-107; United States v. School District 151 of Cook County, Ill., *supra*, 301 F.Supp. at 320.

[14] 5. The County and State Boards acted contrary to the Fourteenth Amendment by selecting school district boundaries for the central eastern portion of Allegheny County which conformed to and built upon patterns of residential segregation in this area of the county. Bradley v. Milliken, *supra*, slip opinion, at 9-10; Davis v. School District of Pontiac, *supra*, Sloan v. Tenth School District of Wilson County, Tenn., 433 F.2d 587, 589 [6th Cir. 1970]; United States v. Board of Education, Inc. School Dist. No. 1, Tulsa County, Okl., 429 F.2d 1253, 1259 [10th Cir. 1970]; Brewer v. School Board of City of Norfolk, Va., 397 F.2d 37, 42 [4th Cir. 1968]; Spangler v. Pasadena City Board of Education, *supra*, 311 F.Supp. at 522.

[15] 6. When the natural and foreseeable consequences of actions taken by school authorities are to preserve segregation within the public schools or to hamper its removal, such actions violate the Fourteenth Amendment. Bradley v. Milliken, *supra;* United States v. Texas Education Agency, 467 F.2d 848, 863-864 [5th Cir. 1972] and cases cited therein at n. 23; United States v. School District 151 of Cook County, Ill., *supra*, 404 F.2d 1125; Spangler v. Pasadena City Board of Education, *supra*.

[16] 7. The natural, foreseeable and actual effect of combining Braddock, North Braddock and Rankin into a single school district was to perpetuate, exacerbate and maximize segregation of school pupils. Such conduct constituted an act of

de jure discrimination in violation of the Fourteenth Amendment. Bradley v. Milliken, *supra,* 345 F.Supp. at 939-940; Kelly v. Guinn, *supra;* Davis v. School District of City of Pontiac, Inc., *supra,* 443 F.2d 573 at 576; Sloan v. Tenth School District of Wilson County, Tenn., *supra,* 433 F.2d at 590; United States v. Board of Education, Inc. School Dist. No. 1, Tulsa County, Okl., *supra,* 429 F.2d at 1259 and cases cited therein; Johnson v. San Francisco Unified School District, *supra,* 339 F.Supp. 1341 and cases cited therein; Spangler v. Pasadena City Board of Education, *supra,* 311 F.Supp. at 522.

[17] 8. While the state may have no affirmative duty to eliminate public school segregation when it has done nothing to create it, nevertheless when it seeks change, it must proceed in a fashion that will lessen previously existing school segregation. Bradley v. Milliken, *supra;* United States v. Texas Education Agency, *supra,* 467 F.2d at 863-864; Davis v. School District of City of Pontiac, Inc. *supra;* Spangler v. Pasadena City Board of Education, *supra,* 311 F.Supp. at 522-523.

[18, 19] 9. The State and County Boards' refusal to consider racial criteria in adopting the plan of organization of administrative units pursuant to Act 150 constituted an explicit racial classification in that educational matters related to racial criteria were treated differently from educational matters related to other criteria. Lee v. Nyquist, 402 U.S. 935, 91 S.Ct. 1618, 29 L.Ed.2d 105 [1971] aff'g 318 F.Supp. 710 [W.D.N.Y. 1970] (three judge); Hunter v. Erickson, 393 U.S. 385, 89 S.Ct. 557, 21 L.Ed.2d 616 [1969]; Bradley v. Milliken, 433 F.2d 897, 902-904 [6th Cir. 1970] and cases cited therein. Racial classifi[824]cations are constitutionally suspect and will be upheld only if absolutely necessary to the accomplishment of a permissible state policy. Hunter v. Erickson, *supra;* Loving v. Virginia, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 [1967]; McLaughlin v. Florida, 379 U.S. 184, 85 S.Ct.283, 13 L.Ed.2d 222 [1964].

[20] 10. A violation of the Fourteenth Amendment's prohibition against discrimination having been found, this Court has continuing jurisdiction of this action for all purposes, including the granting of effective relief. Brown v. Board of Education of Topeka, 349 U.S. 294, 75 S.Ct. 753, 99 L.Ed. 1083 [1955]; Bradley v. Milliken, *supra*, slip opinion at 53; 345 F.Supp. at 937; Kelley v. Altheimer Ark. Public School Dist. No. 22, 378 F.2d 483, 489 [8th Cir. 1967].

[21] 11. On the basis of this Court's findings of unconstitutional school segregation, the present constitutional obligation of defendant school authorities is at the earliest possible time to adopt and implement an educationally sound, practicable plan of desegregation that promises realistically to achieve now and hereafter the greatest possible degree of actual school desgregation. Swann v. Charlotte-Mecklenburg School Board of Education, *supra;* Green v. County School Board, 391 U.S. 430, 88 S.Ct. 1689, 20 L.Ed.2d 716 [1968]; Bradley v. Milliken, *supra*, 345 F.Supp. at 937 and cases cited therein.

[22] 12. The remedial obligation rests with school authorities; but where in any way they fail, or are unable because of the circumstances of the case, to fulfill any part of the obligation promptly and fully, this court has broad equity power, and the duty to insure that demonstrable progress be made now; that a schedule for planning be adopted forthwith; and that necessary planning be specifically ordered and immediately undertaken in order that a constitutionally adequate plan may be fashioned, and implemented as soon as possible. Swann v. Charlotte-Mecklenburg School Board of Education, *supra;* Carter v. West Feliciana School Bd., 396 U.S. 290, 90 S.Ct. 608, 24 L.Ed.2d 477 [1970], same 396 U.S. 226, 227-228, 90 S.Ct.467, 24 L.Ed.2d 382 [1969]; Bradley v. Milliken, *supra*, 345 F.Supp. at 938; Acree v. County Bd. of Education of Richmond Co., Ga., 458 F.2d 486 [5th Cir. 1972]; Pennsylvania Ass'n Retard. Child. v. Commonwealth of Pa., 334 F.Supp. 1257, 1266-1267 [E.D.Pa.1971]; Fed.R.Civ.P. 52.

ORDER

And now, this 15th day of May, 1973, this Court having found that the County and State Boards acted contrary to the Constitution in adopting the plan of organization of administrative units which combined Braddock, North Braddock and Rankin into a single school district, it is hereby ordered and directed that:

(1) Defendants Commonwealth of Pennsylvania, The Pennsylvania State Board of Education, and W. Deming Lewis shall prepare and submit to this Court within 45 days from the date of this Order a comprehensive plan of school desegregation for the central eastern area of Allegheny County to remedy the Constitutional violations found by this Court, which plan shall become final unless objected to by plaintiffs within 20 days after it is filed with the Court.

(2) Such plan shall meet the following standards:

(a) the plan shall alter the boundary lines of the General Braddock Area School District and, as appropriate, of adjacent and/or near-by school districts.

(b) the plan shall be an educationally sound and practical plan of desegregation that promises now and hereafter to achieve[825]the greatest possible degree of desegregation within the public schools of the central eastern area of Allegheny County, taking into account the practicalities of the situation.

(c) the plan shall set forth the dates on which it shall go into effect, which dates shall be set as early as possible.

(3) Defendants Allegheny Intermediate Unit Board of School Directors, and Edward Hallenberg, its President, shall assist in the preparation of the plan in all respects within their

special area of responsibility and to the fullest extent render the benefits of their expertise and knowledge of local facilities and resources so that the terms of this order may be carried out by the other Defendants.

(4) In preparing said desegregation plan it is anticipated that defendants will consider the factor of racial balance along with other educationally relevant criteria and that the plan submitted by defendants will be consistent with the policies of the Department of Public Instruction and Human Relations of Pennsylvania relating to school integration.

(5) Defendants shall give each school district whose boundaries may be altered by said school desegregation plan the opportunity to be heard prior to the adoption of a final plan.

(6) Until said school desegregation plan is finally approved by this Court, defendants are hereby enjoined and restrained from taking any action, directly or indirectly, that may in any way limit or otherwise affect any school assignment options that could possibly be considered or proposed by any parties to this action.

(7) This Court expressly retains complete and continuing jurisdiction to modify this final judgment and decree on its own motion or on motion of any party.

(8) This judgment and decree shall take effect immediately.

APPENDIX B-3

Dorothy Hoots, individually and as mother of her children Janelle Hoots and Jamie Hoots, Mrs. Addrallace Knight, individually and as mother and natural guardian of her children Ronald Knight, Loretta Knight, Terrance Knight, Marc Knight and Byron Knight; Barbara Smith, individually and as mother and natural guardian of her children Tawanda Smith, Tevela Smith, Joseph Smith, Wesley Smith and Eric Smith; on behalf of themselves and all others similarly situated

v.

Commonwealth of Pennsylvania: Edward X. Hallenberg, President of the Allegheny County Board of School Directors; the Allegheny County Board of School Directors; W. Deming Lewis, Chairman of the Pennsylvania State Board of Education; Michael Sullivan, President of the School District of the Borough of Braddock; the School District of the Borough of Braddock; Andrew Lisyak, President of the School Board of the School District of the Borough of Rankin; the School District of the Borough of Rankin, Leo Campbell, President of the School Board of the School District of the Borough of North Braddock; and the School District of the Borough of North Braddock; the Allegheny Intermediate Unit Board of School Directors and Edward X. Hallenberg, as President of the Allegheny Intermediate Board of School Directors,

Turtle Creek Area School District, Edgewood School District, West Mifflin School District, Steel Valley School District, East Allegheny School District, Swissvale Area School District, Churchill Area School District, and Gateway School District.

Civ. A. No. 71-538.

UNITED STATES DISTRICT COURT,
W. D. Pennsylvania.

March 5, 1981.

Action was instituted on complaint alleging that consolidation of area school districts in county had resulted in creation of racially segregated schools. The United States District Court

for the Western District of Pennsylvania, Gerald J. Weber, Chief Judge, entered order denying injunctive relief, and plaintiff appealed. The Court of Appeals, James Hunter, III, Circuit Judge, 639 F.2d 972, vacated and remanded. On remand, the District Court, Weber, Chief Judge, held that state and county boards violated the Constitution in manner in which school district lines were drawn to create the General Braddock Area School District and, thus, all surrounding districts could be implicated in remedial interdistrict plan to remedy racial segregation, despite their alleged lack of involvement in process.

Order entered.

Schools 13(15)

State and county boards violated Constitution in manner in which school district lines were drawn to create the General Braddock Area School District and, thus, all surrounding districts could be implicated in remedial interdistrict plan to remedy racial segregation, despite their alleged lack of involvement in the process. 24 Pa.P.S. § 2400.1 et seq.

Thomas J. Henderson, Neighborhood Legal Services Assoc., Pittsburgh, Pa., James S. Liebman, New York City, for plaintiff.

Allen C. Warshaw, Deputy Atty. Gen., Chief, Civ. Litigation, Com. of Pa., Dept. of Justice, Harrisburg, Pa., for Com. of Pa.

J. Robert Maxwell, Pittsburgh, Pa., for Churchill.

John J. Hickton and Alan Opsitnick, Pittsburgh, Pa., for Swissvale.

Thomas M. Rutter, Pittsburgh, Pa., for Gateway and West Mifflin.

G.N. Evashavik, Pittsburgh, Pa., for Turtle Creek.

Anton Bigman, Pittsburgh, Pa., for General Braddock.

[616] Donald C. Fetzko, West Mifflin, Pa., for Steel Valley.

Carl W. Brueck, Pittsburgh, Pa., for Edgewood.

William M. Wycoff and J. Frank McKenna, III, Pittsburgh, Pa., for East Allegheny.

OPINION

WEBER, *Chief Judge.*

In 1973, this court found the General Braddock Area School District was a racially segregated district, created by the Commonwealth of Pennsylvania through its state and county Boards. Since that time, the court has heard testimony on several plans designed to desegregate the school system. At this stage, however, no further decisions on an appropriate plan can be made until it is determined which, if any, of the surrounding school districts can be included in any remedy within the guidelines of *Milliken v. Bradley*, 418 U.S. 717, 94 S.Ct. 3112, 41 L.Ed.2d 1069 (1974). (*Milliken I*).

This was a matter set down for briefing and argument in August 1980 at the time of extensive hearings on this case. Our consideration and determination of this matter was interrupted and delayed by the abrupt change of position of plaintiffs' counsel, the interlocutory appeal which followed, and the five months' wait until the decision of the Court of Appeals, 3rd Cir., 639 F.2d 972, on this matter. Now that it is back with this court time was required to refresh recollection and review files before determining what might have been determined in September 1980. The court has relied on the arguments made at that time and the extensive briefs filed at various points to arrive at the following conclusions.

Milliken held that a multi-district remedy was impermissible where the court has found a condition of segregation in

only one district, unless it can be shown that the violation ws caused by the acts of adjacent school districts.

> The controlling principle consistently expounded in our holdings is that the scope of the remedy is determined by the nature and extent of the constitutional violation. *Swann*, [*v. Charlotte-Mecklenburg Bd. of Ed.*] 402 U.S., [1] at 16 [91 S.Ct. 1267, at 1276, 28 L.Ed.2d 554]. Before the boundaries of separate and autonomous school districts may be set aside by consolidating the separate units for remedial purposes or by imposing a cross-district remedy, it must first be shown that there has been a constitutional violation within one district that produces a significant segregative effect in another district. Specifically, it must be shown that racially discriminatory acts of the state or local school districts, or of a single school district have been a substantial cause of interdistrict segregation. Thus an interdistrict remedy might be in order where the racially discriminatory acts of one or more school districts caused racial segregation in an adjacent district, or where district lines have been deliberately drawn on the basis of race. In such circumstances an interdistrict remedy would be appropriate to eliminate the interdistrict segregation directly caused by the constitutional violation. Conversely, without an interdistrict violation and interdistrict effect, there is no constitutional wrong calling for an interdistrict remedy.

Milliken v. Bradley, Supra at p. 744-45, 94 S.Ct. at 3126-27.

Before any proposed remedy can be fully considered we must review the facts of this case to determine whether an interdistrict remedy is appropriate here or whether any remedy imposed must be limited in its application to less than all of the districts joined herein. It begins to appear that there is no possible remedy that would effectively desegregate General Braddock that does not include many neighboring school districts. Because an interdistrict remedy may be the only remedy available to the court, we must review the facts of this case to determine whether such a remedy is appropriate here.

Furthermore, from the testimony produced at the hearings on the tuition plan it becomes more evident that an interdistrict remedy that does not include a broad area [617] would be a futile judicial exercise because limiting the remedy to only some of the districts, or the adjacent districts, would enlarge the size of the segregated district because the school population in some nearby districts approaches the degree of minority concentration existing in General Braddock Area School District. The focus of the infection would metastasize; a super General Braddock Area School District would be created with the same problem. The same consideration required that we reject Plan 22-W because the inclusion of Wilkinsburg completely upset the racial balance sought.

The General Braddock Area School District was created as a result of a reorganization of school districts initiated by the Commonwealth and accomplished by three specific pieces of legislation.

Prior to 1961, the Pennsylvania Public School Code of 1949, 24 P.S. § 2-251 allowed school districts to merge voluntarily. Thereafter there was a series of statutes compelling mergers. The Commonwealth first passed the Act of Septemmer 12, 1961, P.L. 1283, No. 561, 24 P.S. § 2-281 et seq. [Act 561] to effectuate the state's goal of achieving comprehensive programs of education through larger school districts. Although the Act recognized voluntary merger of districts this was the first Act to set up a compulsory system of reorganization and merger and provided that each county board of school directors should prepare a plan of organization of administrative units for the county for review by the State Council of Education by Jan. 1, 1963. 24 P.S. §§ 2-282, 2-283. *State Board of Education v. Franklin Township School District*, 209 Pa.Super. 410, 228 A.2d 221, 223 (1967). Once submitted by the county board, the State Board would review the plan for approval taking into consideration certain environmental criteria, including topography, pupil population, socio-economic

characteristics, facility of transportation of pupils, utilization of existing school buildings, existing administrative units, and potential population changes. 24 P.S. § 2-281. After review, the State Board could reject or rewrite those plans that it did not consider "wise in the best interests of the educational system of the Commonwealth". It was further provided specifically that the State Board could not approve any plan for an administrative unit which contained a student population of less than 4,000 pupils unless the above criteria were considered and the Board found that the situation necessitated the lower student population. In no event, however, was the State Board to approve any administrative unit with less than 2,500 pupils. 24 P.S. § 2-283. Once approved, the administrative units were to become operative in 1965.

At the time Act 561 was passed, the following school districts operated in central eastern Allegheny County: Wilmerding, North Versailles, Gateway, Turtle Creek, East Pittsburgh, Braddock, North Braddock, Rankin, Braddock Hills, Swissvale, Edgewood, Wilkens, and Forest Hills.[1] On May 15, 1962, before the County Board had established a plan for reorganization, Wilkens and Forest Hills areas voted to voluntarily merge into a single district known as Churchill. Churchill was later approved by the State Board on June 25, 1962. Allegheny County did submit a reorganization plan under Act 561 which was approved by the State Board, but before the effective date of 1965.

Act 299 (Act of August 8, 1963, P.L. 564, No. 299, 24 P.S. § 2-290 et seq.) was passed to replace Act 561. Act 299 contained the same basis provisions as Act 561, but included a three-tiered appeals process for "aggrieved" school districts. The criteria for reorganization and the minimum 4,000 pupil population provision were both carried over. Act 299, however, expresly reserved to the State and County Boards the right to reconsider its approval of previously joined districts (ones formed by voluntary merger prior to Act 299) and to be

[1] Several of these districts did not maintain their own high schools but utilized a tuition plan with neighboring districts.

remerged into [618]even different and larger districts. 24 P.S. § 2-292. Therefore, any administrative units that had been approved under Act 561 would still come under the authority of Act 299 and the County was effectively operating from a clean slate.

Although aware of strenuous objections to the proposed plan submitted by the County Board, at its meeting on September 6, 1964, the State Board approved the following administrative units: Unit 14 (Gateway); Unit 15 (Wilkens and Forest Hills combining to form Churchill); Unit 18 (Wilmerding and North Versailles combining to form East Allegheny) and Unit 38 (Braddock Hills, Edgewood, and Swissvale). As a result, Units 14, 15 and 18 all became operative on July 1, 1966. Unit 38 did not because Edgewood took an appeal.

Along with Unit 38, this left unapproved the racially unbalanced and controversial proposed Unit 16, which consisted of Braddock, North Braddock, Rankin, Turtle Creek, and East Pittsburgh. Since the surrounding municipalities with approved school districts were now operative, they were no longer available under any reorganization plans. This left the State few options with which to deal with Unit 16. The state chose to create new Unit 16, consisting of Braddock, North Braddock and Rankin (with a close to 40% black student population as of 1967), and new Unit 42, consisting of Turtle Creek and East Pittsburgh (with a 1.3% black student population as of 1967).

In 1968, the legislature passed Act 150 (Act of July 8, 1968, P.L. 299. No. 150, 24 P.S. § 2400.1 et seq.) which superseded Act 299. This Act was simply a continuation of Act 299 and contained the same basic provisions as Act 299, except for modified appeals procedure. Act 150 further provided that all districts that had been merged under Act 299 would not be forced to merge to form larger districts. Therefore, with nothing new to work with, the State approved Unit 16, now called

General Braddock Area School District, and Unit 42, now known as Turtle Creek, as they had been proposed under Act 299. The only change of the County Board's plan that occurred under Act 150 was that the proposed Unit 38 (Edgewood, Braddock Hills and Swissvale) was split up into two smaller districts: Edgewood, with a student population of 928, 0% black, and Swissvale and Braddock Hills, now known as Swissvale, with a student population of 2,286, 10% black. This was done in spite of the statutory criteria for the size of districts.

These school districts went into effect on July 1, 1971 and this lawsuit was filed on June 9, 1971.

In an earlier opinion in this case, *Hoots v. Commonwealth of Pennsylvania*, 359 F.Supp. 807 (1973), this court made the following conclusion of law.

> 7. The natural, foreseeable and actual effect of combining Braddock, North Braddock and Rankin into a single school district was to perpetuate, exacerbate and maximize segregation of school pupils. Such conduct constituted an act of *de jure* discrimination in violation of the Fourteenth Amendment. (citations omitted).

359 F.Supp. 807, at 823.

This constitutional violation was accomplished by the State and County Board through the reorganization process completed through Acts 561, 299, and 150. This court found specifically that the County and State Boards maximized racial segregation in the public schools by creating a school district composed of Braddock, North Braddock and Rankin. At the time the state approved such a district, no other combination of school districts in the area would have created a district with as large a percentage of non-white enrollment. (Finding of Fact No. 51, *Hoots, supra* at 819). Furthermore, the plan of organization adopted by the County and State Boards pursuant to Act 150 failed to meet many of the essential requirements of that Act and recognized educational standards. Act 150 was

not met in several ways, the most obvious of which is the disregard of the 4,000 pupil population requirement (unless a smaller district was required) by combining Turtle Creek and East Pittsburgh [619] with a population of only 1,898, by combining Braddock Hills and Swissvale with an enrollment of only 1,925, and by permitting Edgewood to stand alone with an enrollment of only 928. (Findings of Fact, No. 62. *Hoots supra*, at 819).

The court found that the State and County Boards knew or should have known that they were creating a racially segregated school district. (Finding of Fact No. 50, *Hoots, supra*, at 818.) This court also found that the school districts in the vicinity of Braddock and Rankin continually sought to avoid being included in a school district with them due to the high concentration of blacks. (Finding of Fact No. 39, *Hoots, supra*, at 816.) At the time that General Braddock Area School District was approved by the State Board, alternatives to a school district composed of Braddock, North Braddock and Rankin were available that would have been more consistent with Act 150. In view of the availability of these alternatives, the decision of the County and State Boards to create General Braddock Area School District was contrary to Act 150 and the standards set forth therein. (Findings of Fact 53 and 54, *Hoots, supra*, at 820).

On the basis of all the facts, this court concluded that by combining Braddock, North Braddock and Rankin into one school district, the County and State Boards created a racially segregated school district. (Finding of Fact No. 58, *Hoots, supra*, at 820). Furthermore, this court found that "the County and State Boards devised this plan of organization of administrative units which comprised Braddock, North Braddock and Rankin into one school district to satisfy the desires of as many of the surrounding municipalities as possible to be placed in a school district which did not include Braddock and Rankin." (Finding of Fact No. 59, *Hoots, supra*, at 821.) Finally, the

record contained no evidence showing that the school district boundaries established in the plan of organization of administrative units are rationally related to any legitimate purpose and the court found that those boundaries did not promote any valid state interest. (Finding of Fact No. 61, *Hoots, supra,* at 821.)

On the basis of the above history of the reorganization of school district boundaries in the central eastern portion of Allegheny County pursuant to Acts 561, 299 and 150 and on the Findings of Fact of this court, particularly those laid out above, the court holds that a multi-district remedy is appropriate and permissible in this case. General Braddock Area School District was created as a result of an interdistrict violation conducted by the state during the reorganization process which included the redrawing of school district boundaries in that part of Allegheny County. *Milliken I* holds that "an interdistrict remedy would be appropriate to eliminate the interdistrict segregation directly caused by the constitutional violation." This case clearly falls within *Milliken I* guidelines for an interdistrict remedy, since racially discriminating acts of the state have been a substantial cause of interdistrict segregation.

The neighboring school districts that argue against an interdistrict remedy base their arguments on the ground that this court has made no finding that they had any involvement in the reorganization process which would enable the court to apply any remedy to them. They claim that since they are not guilty of any specific discriminatory actions they cannot be implicated in a multidistrict remedy.

A multidistrict remedy can be applied to surrounding districts that have not been found to have committed a constitutional violation themselves where their boundaries were drawn or redrawn during the course of the same violation which created the segregated school districts. *Morrilton School District No. 32 v. United States,* 606 F.2d 222 (8th Cir. 1979),

cert. denied 444 U.S. 1071, 100 S.Ct. 1015, 62 L.Ed.2d 753 (1980); *Evans v. Buchanan,* 416 F.Supp. 328 (D.Del.1976), *aff'd* 555 F.2d 373 (3d Cir. 1977; *United States v. Board of School Commissioners of the City of Indianapolis,* 541 F.2d 1211 (7th Cir. 1976).

In the *Morrilton* case, the court found that the school district lines in Conway [620] County followed a discriminatory pattern and ordered an interdistrict remedy. Some of the surrounding districts that would be effected by the remedy argued that since there was no evidence implicating them in a direct way, the court had no authority to order them to remedy the state's wrong. The court found this argument to be without merit since the effects of the unconstitutional state action are felt in both districts. The court went on to quote *United States v. Board of School Commissioners of City of Indianapolis,* 573 F.2d 400, 410 (7th Cir. 1978), *cert. denied* 439 U.S. 824, 99 S.Ct. 93, 58 L.Ed.2d 116 (1978):

> [S]chool officials may not maintain that their districts should be excluded from any interdistrict remedy if they are found innocent of committing any constitutional violations because they should not be held responsible for the acts of the state legislators or other state subdivisions such as a local housing authority or a zoning board. The commands of the Fourteenth Amendment are directed at the state and cannot be avoided by a fragmentation of responsibility among various agents. *Cooper v. Aaron,* 358 U.S. 1, 15-17, 78 S.Ct. 1401, [1408-09] 3 L.Ed.2d 5 (1958). If the state has contributed to the separation of the races, it has the obligation to remedy the constitutional violations. That remedy may include school districts which are its instrumentalities and which were the product of the violation. 606 F.2d at 228-229.

The several opinions written in the Wilmington case, *Evans v. Buchanan, supra,* also support an interdistrict remedy in a case whose facts are similar to our own. The State of Delaware had set out a plan for reorganization and consoli-

dation, which excluded the school district of Wilmington by a provision which limited the maximum pupil enrollment to 12,000. Since Wilmington already had an enrollment of over 15,000, they were not considered for consolidation with any of the surrounding school districts. Since their non-white population was already at 66%, this had the effect of perpetuating and continuing segregation in the Wilmington schools.

The court in *Evans* found that the state had violated the constitution by acting in a manner which was a substantial and proximate cause of the existing disparity in racial enrollments in the districts of that area. They ordered a multidistrict remedy and the surrounding districts complained that they had committed no constitutional violation and should not be included in such a remedy. The court found this defense to be inadequate where the local boards are creatures of the state that had commi[illegible] the violation.

> [illegible]at birth rates, or population shifts, or other [illegible] contributed to a degree will not relieve the State [illegible]n its obligation to desegregate. The remedy for the violation must include school districts which are its instrumentalities and which were the product of one of the violations. The remedy for the acts of the State may be inconvenient, burdensome, and expensive to some of those instrumentalities, but neither inconvenience, burden nor expense can negate the duty of the Court to order effective relief when a not insubstantial violation has been shown.

Evans, supra, at 339-340.

The case presently before this court, as in the cases cited above, calls for an interdistrict remedy. The State and County Boards violated the constitution in the manner in which the school district lines were drawn and so all surrounding districts can be implicated in a remedy, despite their alleged lack of involvement in the process.

> Where the State has contributed to the separation of races by redrawing school lines, necessarily the districts on both sides of the lines are part of the violation itself, and exclusion of the suburban districts cannot be predicated on their own purported innocence when their present lines were drawn or redrawn in the course of a violation.

Evans, supra, at 340.

Neither are the surrounding districts innocent in the reorganization plan which created General Braddock. This court found [621] that the school districts in the vicinity of Braddock and Rankin continually sought to avoid being included in a school district with them due to the high concentration of blacks. *Hoots*, supra. Finding of Fact No. 39.

Some of the school districts also claim a particular exclusive status, allegedly given them by the state, which would exclude them from being a part of any multidistrict remedy. Churchill, and East Allegheny were approved as school districts under Act 299. When that Act was superceded by Act 150, districts approved under Act 299 were exempted from Act 150. Churchill and East Allegheny claim they were granted "grandfather status" and therefore were not implicated in the creation of General Braddock which occurred under Act 150. Edgewood claims that because its boundaries preexisted all mergers, they were never involved in any redistricting which led to the creation of any segregated district.

This argument is without merit since the constitutional violation was not only committed under Act 150, but pursuant to the entire reorganization process that began with Act 561. Furthermore, the very elimination from consideration for merger with those districts was itself a contributing factor to the creation of a segregated school district since all the districts with a lower black student population were now excluded from any plan, leaving General Braddock Area School District in an isolated position.

Churchill argues exclusion from a remedy even further in that they had begun their voluntary merger plans back in the 1950's, before Act 561 and the state reorganization plan. It is irrelevant, however, when their current boundaries were first established. The actual vote to merge did not occur until after the passage of Act 561. The state at all times under Act 561 and Act 299 had expressly retained the power to force further merger with districts that had previously voluntarily merged. The fact that the state chose not to disrupt the new district of Churchill does not mean that the State could not have ordered them to merge again with Braddock Hills. Furthermore, it was the refusal to force such a merger, which was within the state's power, which contributed to the isolation of General Braddock.

Finally, the alleged "grandfather status" granted by Act 150 cannot eliminate any of the school districts from a future remedial plan of this court or the State. School districts are the creation and instrumentalities of the state and have no vested rights in their boundaries. In a case challenging the ability of the state to require merger under Act 299, the Pennsylvania Supreme Court held that the legislature reserves its powers to alter school laws in all contracts made by school districts. The court found that Act 299 could alter any mergers completed under prior acts since the Public School Code of 1949 did not intend to create vested rights but merely authorized the formation of school districts which would exist until changed by future legislative direction.

> The continued ability to alter the organization of the school system throughout the Commonwealth is a prerequisite to the fulfillment of the Legislature's constitutional duty to provide for the maintenance of a thorough and efficient system of public schools.
>
> • • • • •
>
> The jointure agreement involved here was made pursuant to the authority given to school districts to enter into such agreements with the concomitant condition inherent in such legislative authority that actions taken pursuant there-

> to are subject to later change by the Legislature. As was pointed out in *Dodge v. Bd. of Education*, 302 U.S. 74, 79, 58 S.Ct. 98, 100 [82 L.Ed. 57] (1937), 'the presumption is that such a law is not intended to create private contractual or vested rights, but merely declares a policy to be pursued until the Legislature shall ordain otherwise.'
>
> *Chartiers Valley Joint Schools v. Allegheny County Board*, 418 Pa. 520, 528-29, 211 A.2d 487 (1965).

School districts have no vested rights in their boundaries and they can be altered by [622] the state whenever necessary. When the state has committed a constitutional violation in the use of its power, school district lines can be redrawn by the court to remedy that violation.

Edgewood also claims a sort of special status exempting it from any remedial plan since the Pennsylvania Supreme Court upheld its right to stand alone as a school district, despite its obvious non-compliance with the student population requirements. *Edgewood Borough School District Appeal*, 445 Pa. 343, 285 A.2d 880 (1971). That case, however, did not specifically address the propriety of or the motivation for letting Edgewood stand alone. It did not address the segregative effect of that action at all. That case was decided on a finding that the state had not abused its discretion in approving such a school district. The court refused to interfere with administrative decisions.

This court, however, must interfere with administrative decisions which are made by the state during the course of a constitutional violation.

On the basis of the foregoing this court holds that the following school districts may be included in any remedial plan to be considered by this court: Churchill, Turtle Creek, Swissvale, East Allegheny, Edgewood and Gateway.

Two other school districts have been added as parties to consider the nature of the remedy, West Mifflin and Steel Valley. Both these school districts are located across the

Monongahela River from the others in this area of eastern central Allegheny County. They were never considered in prior merger plans. The evidence shows that there is only one bridge carrying heavy traffic connecting these two school districts with the General Braddock area. This factor would make any consolidation with West Mifflin or Steel Valley highly impractical and they are, therefore, not to be included in any remedial plan before this court. Furthermore, the evidence suggests that as to Steel Valley, the present high degree of black school attendance in that district would only spread the area of segregation, and in West Mifflin the black school population in the most adjacent school facilities shows the same pattern. Furthermore, neither Steel Valley nor West Mifflin were involved in the jointure, consolidation or merger of the school districts which eventually led to the creation of the General Braddock Area School District.

ORDER

AND NOW, this 5th day of March, 1981, IT IS ORDERED THAT further consideration of remedial plans shall be governed by the above Opinion, and the motions to dismiss of the school districts of Churchill, Turtle Creek, Edgewood, East Allegheny and Gateway are DENIED. The motions to dismiss of the school districts of Steel Valley and West Mifflin are GRANTED.

APPENDIX B-4

IN THE UNITED STATES DISTRICT COURT
For the Western District of Pennsylvania

Dorothy Hoots, individually and as mother of her children, Janelle Hoots and Jamie Hoots, Mrs. Addrallace Knight, individually and as mother and natural guardian of her children Ronald Knight, Loretta Knight, Terrance Knight, Marc Knight and Byron Knight, Barbara Smith, individually and as mother and natural guardian of her children Tawanda Smith, Tevela Smith, Joseph Smith, Wesley Smith and Eric Smith; on behalf of themselves and all other similarly situated

vs.

Commonwealth of Pennsylvania; Edward X. Hallenberg, President of the Allegheny County Board of School Directors; The Allegheny County Board of School Directors; W. Deming Lewis, Chairman of the Pennsylvania State Board of Education; Michael Sullivan, President of the School District of the Borough of Braddock, The School District of the Borough of Braddock, Andrew Lisyak, President of the School Board of the School District of the Borough of Rankin; The School District of the Borough of Rankin, Leo Campbell, President of the School Board of the School District of the Borough of North Braddock; and The School District of the Borough of North Braddock; The Allegheny Intermediate Unit Board of School Directors and Edward X. Hallenberg as President of the Allegheny Intermediate Board of School Directors

Churchill Area School District, Edgewood School District, Swissvale Area School District, Turtle Creek Area School District

} Civil Action No. 71-538

OPINION

WEBER, *C.J.* April 28, 1981

We begin bearing in mind a profound observation of Henry Louis Mencken that every difficult problem always has a simple solution and that solution is always wrong. There is no simple solution here and we have searched all of those offered. Any solution is involved with high emotional reactions to the extent that calm discussion is rarely possible in the presence of as many as twelve sets of counsel, mostly representing diverse and possibly irreconcilable interests.

The history of this case has been recited too often in the opinions of this court and reviewing courts to justify any repetition here. It has not always been discussed accurately. The description of the plaintiffs as parents of children in the General Braddock Area School District, of the plight of the Hoots, Knight and Smith children was pure fancy. Mrs. Hoots has not been a resident of this District since before the very first hearings; nine of Mrs. Knight's children graduated from Braddock High School before the reorganization, and Mrs. Knight has not resided in the district since 1977. Mrs. Smith has remained a resident of General Braddock Area School District and an employee of plaintiffs' counsel, but her children are enrolled in parochial schools. Because of these facts, plaintiffs have moved for the substitution of new parties plaintiff, although the caption still bears the Hoots name for identifying purposes.

Nor is the picture of the black children of General Braddock sitting on the steps of the courthouse waiting for justice accurate. It would be more accurate to state that they are part of a group, both black and white, that are picketing the court to stop any plan that involves the closing of Scott High School. They have so testified, they have filed petitions with the court, and have indulged in a letter writing campaign. This

feeling was particularly strong when Scott High School became the State Champion in the basketball competition.

Nevertheless, there is a clear violation of constitutional rights, and there are now proper parties plaintiff before the court; regardless of the size of the group they have a right to be remedied.

Following our rejection of Plan A in 1977 for the reasons set forth in the opinion and the appeal therefrom, this court proceeded on the motion of the plaintiffs to order the Commonwealth to prepare a tuition voucher plan. Additional neighboring school districts were added as defendants for the purpose of devising a remedy. The Commonwealth required more time than was originally allowed, and finally filed its detailed tuition plan on May 15, 1980. The school districts involved filed objections by June 16, 1980, and hearings began on July 14, 1980 and continued until July 30, 1980. In the midst of the hearings, which the court had limited solely to the merits of the tuition plan, plaintiffs took an abrupt change of position and opposed the plan, and presented testimony in opposition. In the midst of the hearings plaintiffs presented a motion calling for the immediate rejection of the tuition plan and for an injunctive order requiring the Commonwealth to prepare a merger or consolidation plan. This was denied because the court had not yet made any decision on the requested tuition plan and an immediate appeal by plaintiffs followed.

In the meantime, two additional plans were submitted by parties, an upgrade plan by General Braddock, and a metropolitan merger plan by the Commonwealth, both of which were solely preliminary proposals without a detailed workup. The Commonwealth later withdrew its metropolitan plan from consideration. No plan that we had considered up to that time achieved a consensus of approval by the parties; the tuition plan was the least strenuously opposed because it left the

individual administrative units intact, including General Braddock itself, and because it proposed distributing the General Braddock students over a very wide area and among many districts. Nevertheless, it consigned General Braddock students to a second class status, that of tolerated guests in a foreign school district, and it deprived their parents of a voice in the control of the school district that was educating their children.

In August 1980 we were prepared to continue hearings on other plans but all of this was interrupted by the pendency of the appeal.

Upon the return of the mandate on January 27, 1981, we immediately convened the counsel for consideration of further action. We rejected the upgrade plan which did essentially nothing to achieve desegregation and also we determined the *Milliken v. Bradley* issue as it applied to certain of the school districts joined as defendants for the purpose of relief. We dismissed two of the previously joined school districts because their further involvement was considered unnecessary. We determined that the only appropriate remedy in this situation must be a multi-district merger of several school districts into a single district. The plaintiffs' counsel informed us through certain motions for discovery, that they had engaged professional expert services and would submit a plan. On March 24, 1981, the plaintiffs for the first time proposed their own remedy. This called for a plan of consolidation of five school districts. We set the matter down for hearings on April 20, 1981.

We strictly limited this hearing to the question of the geographical boundaries of the proposed district and the identity of the districts to be included. At this point seven school districts remained as defendants for the purpose of constructing a remedy. We limited the plaintiffs to one day of testimony limited solely to this issue, and gave all defendants two days for cross-examination and presentation of direct testimony. The defendants were allowed to divide their time among themselves

but did not choose to do so. Only four districts desired to present any direct testimony and for the most part only these districts undertook cross-examination.

General Braddock Area School District announced at the opening of the hearing that they joined with the plaintiffs' motion to approve the five district plan.

We barred all testimony as to the administration of the plan, its implementation, pupil assignments, the further use or discontinuance of school facilities, both because we believed that the essential primary question for our consideration was the make-up of the new district, and also because we believe that the organization and planning of the educational system in the New School District was a matter for determination by the Pennsylvania Department of Public Instruction, the Allegheny County Intermediate Unit, and the representations of the New School District.

We therefore proceed to our determination of the New School District.

THE COMPOSITION OF THE NEW DISTRICT.

The Court finds that a New School District composed of the present school districts of Churchill, Edgewood, Swissvale, General Braddock, and Turtle Creek would achieve desegregation of the General Braddock Area School District and would achieve the highest beneficial results over and above the results of any other plan submitted to this Court by any party during the whole period of this litigation. The Court bases this conclusion on the following evidence developed in the record:

(1) It would produce a district with a school population 83% white and 17% minority (mostly black), within a general range of recognized desegregation guidelines and comparable to the population distribution over a wide area of Allegheny County.

(2) The pattern of desegregation established is likely to remain stable.

(3) All of the districts included are contiguous to each other, three of the districts border General Braddock, and the remaining district, Edgewood, borders one and almost borders another.

(4) The area of the New District is moderate in size (13.5 sq. miles) as compared to the average size of Allegheny County Districts (15 sq. miles).

(5) The district is roughly circular in configuration, lending itself to increased administrative and transportation efficiencies.

(6) All points in the district are within 2.5 miles radius of its center, and the greatest diameter from one edge of the district to the other is less than 5 miles.

(7) Student population density of the New District would be 821 per square mile, a high density compared to the 275 per square mile density of the average Allegheny County School District (excluding the City of Pittsburgh).

(8) Student population of the New District would be 9,132 in 1981, which exceeds the minimum of 4,000 students mandated for merged districts under the statutory and regulatory guidelines of the Commonwealth of Pennsylvania.

(9) Student enrollment in all of the merged districts has been declining at a rate exceeding 35% in the past ten years, and from the student population figures in grades from kindergarten to 12th grade may be expected to decline at a comparable rate in the next eight years, all of which indicates a need for consolidation to achieve educational efficiency and economy.

(10) All of the merged districts have excess capacity, in most cases substantial, at all instructional levels, making the excess capacity for the New District 40%. This will increase as

the student population continues to decline. This excess capacity could be greatly reduced by the merging of these districts, the merging of student population, the discontinuance of old buildings requiring extensive repairs, allowing for a better organized comprehensive educational program without additional cost, and the possibility of very substantial savings in costs, as well as achieving desegregation.

(11) The New District will be strongly interconnected by available transportation arteries, and the relatively short distances between most parts of the district will minimize the time and mileage involved in any additional transportation needed.

At the time of the April 1981 hearings, Gateway district and East Allegheny district remained as parties. They were not included in the Motion of Plaintiffs to create a five (5) district consolidation but their motions for dismissal were opposed. At the hearing, testimony was offered as to the reasons for their exclusion and no evidence supporting reasons for their inclusion was presented. In general, neither of these districts should be included. Their large geographical area, the distances of their facilities from the facilities in the New District, and the acute transportation bottlenecks between these districts and the New District made their inclusion highly undesirable. At the close of the hearings their motions for dismissal were granted.

Individual Districts to be Included.

This left five districts to be considered. The reasons for the inclusion of each individual district in the New District are:

(1) *General Braddock:* This district must be included in any remedy because its intentional creation as a racially identifiable black school district constituted the constitutional violation found in this case. Its 63% black student population in a larger area where the surrounding districts vary from less than 1% to a maximum of 13% black makes it mandatory for inclusion. It has continued serious financial problems that make its future as a viable district uncertain.

(2) *Turtle Creek* is included because it is contiguous to the General Braddock area, and also contiguous to Churchill which is also included in the New District. It is racially identifiable as a white school district (98%), it is small in area (1.37 miles), and has a high density of pupils per square mile (920), it has significant unused building capacity, particularly in its high school, and has experienced dropping enrollment and faces a continuing decline. Its present 1,200 student population in the face of a state standard of 4,000 students required for an adequate educational program renders its future as a viable independent school district cloudy. It has adequate transportational connection with the rest of the New District. It has close community business and occupation ties with the General Braddock Area District and also with the Churchill Area. It faces the same economic problems as the General Braddock District.

(3) *Churchill* is included because it is contiguous to General Braddock, as well as contiguous to Turtle Creek, Swissvale, and almost if not actually contiguous to Edgewood. It is identifiable as a 99.2% white school district. It has excess capacity in its facilities and a declining enrollment. Its geographical position puts it in the heart of the New District, and its exclusion from the compact formation of the New District would make all of the considerations of geographical contiguity and compactness of the New District meaningless. Its economic strength would add financial stability to the new district.

(4) *Swissvale* is included because it is contiguous to the General Braddock Area District, as well as contiguous to Churchill and Edgewood in the New District, it is small in geographic area but with a high density of pupils per square mile (771), it is small in student population (1,757), below the minimum state standard requiring consolidation, and its student population. It has many connecting arteries of transportation with the rest of the New District. Its exclusion would result in a large vacuum between the other areas of the New District

because of its central position in the configuration and its nexus of transportation arteries connecting other parties of the New District.

(5) *Edgewood* is included because it is identifiable as a white school district (98%) in a general area the composition of which is 17% black, and where the adjoining district, Swissvale is 13% black; its very small geographic size, (1/2 sq. mile), its high student population density (920 pupils per square mile), and its very low student population (731), which has declined and will continue to decline, and its substantial underutilization of facilities. It is close to many other schools in the New District, and has ready transportation access to the other areas included in the consolidation. We recognize that Edgewood was granted an exemption from the 4,000 minimum student population requirement after much litigation, but its student population has continued to decline. It is highly commendable that this district has been able to attract 100 tuition students from Pittsburgh and other districts to help fill the underutilized facilities, and that it is able to receive $1,000 or $1,200 per tuition student in this process, bringing substantial additional revenue to the district. However, it is possible for Edgewood to educate these additional students at a figure much less than the average cost of education per pupil because of the economic law of marginal cost, no increase of operating costs is involved in the utilization of the empty classroom seats. However, in so doing Edgewood has entered the business of private education and using the profit therefrom to help finance the education of its own residents. This is contrary to the Commonwealth's school district reorganization policy. Edgewood's inclusion rounds out the compact shape of the district, and adds financial stability to the New District.

All of these districts are properly subject to inclusion in the remedy of desegregation of the General Braddock Area School District because of their involvement in the violations which led to the creation of the General Braddock Area School District as set forth in our Opinion of March 5, 1981.

IN THE UNITED STATES DISTRICT COURT
For the Western District of Pennsylvania

Dorothy Hoots, et al. *Plaintiffs,* *vs.* Commonwealth of Pennsylvania et al., *Defendants.*	Civil Action No. 71-538

ORDER

AND NOW, this 28th day of April, 1981, it is hereby ORDERED that the public schools in the districts named herein in central eastern Allegheny County, Pennsylvania, shall be desegregated, effective in the beginning of the first semester of the school year, 1981-1982 in accordance with the following terms and conditions:

(1) As of the date of this Order the following school districts in Allegheny County, Pennsylvania, shall cease to exist as separate school districts and shall be consolidated and merged into a single unitary school district, hereinafter referred to as the "New School District";

Churchill Area School District
Edgewood School District
General Braddock Area School District
Swissvale Area School District
Turtle Creek Area School District.

(2) The New School District created by this Order shall constitute and be deemed established as a school district and shall be belong to the class to which it is entitled as provided by law.

(3) All school directors of the component school districts forming The New School District shall serve out the terms of office for which they were elected. No vacancies occurring in such positions after the date of establishment shall be filled.

(4) On or before the 15th day of May, 1981, such incumbent school directors of the component school districts shall be called into convention by the County Superintendent of Schools and shall select by majority vote an Interim Operating Committee composed of nine (9) incumbent school directors. In selecting the Interim Operating Committee the incumbent school directors shall select no more than two (2) incumbent school directors from any single former district. The decision of the convention in selecting the Interim Operating Committee shall be final. Three (3) of the members of the Interim Operating Committee shall be selected for a term expiring on the first Monday of December, 1981, three (3) for a term expiring on the first Monday of December, 1983, and three (3) for a term expiring on the first Monday of December, 1985. In the event that an incumbent director is selected for a term on the Interim Operating Committee which would expire later than the term for which he was elected as a School Director, he shall serve only until the end of his term for which he was elected as School Director. At the municipal elections held in November, 1981, and at each municipal election thereafter School Directors shall be elected for six (6) year terms and shall take the place of the appointed members of the Board of School Directors of the newly established School District as their terms expire. The members of the Interim Operating Committee shall become and shall serve as the Board of School Directors of the School District on and after the date of its establishment as herein provided.

(5) The incumbent School Directors of the component former school district not selected for membership on the Interim Operating Committee shall serve in an advisory capacity to the Interim Operating Committee and to the Board of

School Directors of the newly established School District. Such incumbent School Directors may attend meetings and participate in discussion of the Interim Operating Committee and Board of School Directors but shall have no vote.

(6) The Interim Operating Committee of the New School District shall develop a plan to divide the New School District into nine (9) regions. The boundaries of the regions shall be fixed and established in such manner that the population of each region shall be as nearly equal as possible and shall be compatible with the boundaries of election districts. Such plan for the division of the school districts shall be submitted for approval to the Court of Common Pleas of Allegheny County. If approved by such court the Clerk thereof shall be immediately certify the regional boundaries contained therein to the County Board of Elections. One (1) School Director who resides in each region shall be elected or appointed by and from each region and at all times each region shall be represented by a Director elected or appointed as herein provided from that region.

(7) The Interim Operating Committee shall have the power and its duties shall be to meet, prepare and adopt a budget, levy and assess taxes and perform all acts and functions necessary to enable the New School District to function properly from and after the date of organization of the Interim Operating Committee.

(8) The Interim Operating Committee shall have the power to fill vacancies should a vacancy in its membership arise due to death, resignation or otherwise provided, however, that the vacancy shall first be filled by the selection of an incumbent School Director elected by one of the component former school districts.

(9) The Interim Operating Committee shall have the power and its duties shall be to propose a name for the New School District. The name proposed shall be reported to the

Department of Public Instruction which shall review the proposed name and approve it if it is not a duplication of a name previously approved by the Department of Public Instruction. When it approves a name, the Department of Public Instruction shall issue a certificate stating that the approved name has been registered as the official designation of the School District.

(10) The component school districts shall continue under the governance of their respective directors until June 30, 1981.

(11) All operating obligations of any component former school district contracted for current operating expenses until June 30, 1981 shall continue to be an obligation of the taxable property within such former component school district.

(12) On or before June 1, 1981, the representatives of the Pennsylvania Department of Education and the Allegheny County Intermediate Unit shall convene a meeting of the Interim Operating Committee to:

(i) assume the governance of the New School District;

(ii) organize the consolidation of the five former school districts;

(iii) establish the administration and provide for the financing of the New School District, and

(iv) take all actions necessary to prepare for the implementation of a plan of desegregation as set forth herein.

(13) The Secretary of the Pennsylvania Department of Public Instruction, or his designate, and the Allegheny County Intermediate Unit shall meet with the Interim Operating Committee of the New School District on or before the 15th day of June, 1981, to design a plan of desegregation and provide for its implementation with the beginning of the 1981-82 school year, and shall continue such planning until such plan is fully operational within the New School District.

(14) The plan of desegregation shall be designed and implemented in such a manner as to achieve and satisfy the greatest possible degree of actual desegregation, including desegregation of student enrollment, attendance, administration, faculty, staff, facilities, programs and activities. The plan shall be equitable in every respect and designed to achieve an equal sharing of the burden of desegregation between black and white students, parents and communities. The plan shall be designed not only to eliminate the effects of past discrimination but to the greatest extent possible, to prevent like discrimination in the future years.

(15) All of the provisions of the act of March 10, 1949 (P.L. 30), known as the "Public School Code of 1949", relating to school districts shall apply to this New School District.

(16) It shall be the primary responsibility of the Secretary of the Pennsylvania Department of Public Instruction, or his designate, to assure that a plan of desegregation is designed and implemented in accordance with the timetable set forth herein. In order to execute this responsibility the Secretary of the Pennsylvania Department of Public Instruction, or his designate, may take any action, consistent with this order and opinion, which it deems necessary to achieve the objectives set forth in this order.

(17) This court shall retain continuing jurisdiction over this action to oversee the planning and implementation of a program of desegregation; to enforce this order; and to enter such other orders as the court deems just and proper to effect a remedy.

/s/ Gerald J. Weber
Gerald J. Weber
Chief United States District Judge

APPENDIX C

Dorothy Hoots, Individually and as mother of her children Janelle Hoots et al.,

Appellees,

v.

Commonwealth of Pennsylvania et al.

Appeal of Turtle Creek Area School District.

Appeal of Churchill Area School District Allegheny County.

Nos. 73-1783, 73-1784, 74-1050, and 74-1051.

UNITED STATES COURT OF APPEALS, Third Circuit.

Argued Feb. 28, 1974.

Decided April 18, 1974.

Appeals from orders of the United States District Court for the Western District of Pennsylvania, Gerald J. Weber J., denying local school districts the right to intervene in a school desegregation action in which the court, having found a plan of reorganization and consolidation of a county's school districts to be invalid as creating racially segregated districts, 359 F.Supp. 807, ordered that a new plan of school desegregation be prepared. The Court of Appeals held that where the local school districts, not having been joined as parties in the original action, did not move to intervene until two years after the action was originally filed, six months after trial and almost one month after the district court's opinion and order were filed, although they had specific notice of the proceedings, their petitions were untimely.

Appeal dismissed.

1. Appeal and Error

Where local districts had not petitioned to intervene as parties in school desegregation case while action pended before

district court and parties to action had not appealed the decision of the district court, Court of Appeals would not raise question of whether such local districts were indispensable parties sua sponte in an "appeal" brought solely by the school districts. Fed. Rules Civ.Proc. Rule 19, 28 U.S.C.A.

2. Federal Civil Procedure

It is within discretion of district court to deny petition to intervene if it is not timely.

3. Federal Civil Procedure

Where local school districts did not intervene in school desegregation case while it pended before district court until two years after action was begun, six months after trial and almost one month after district court's opinion and order were filed, although districts had actual notice of pendency of action, petitions to intervene were not timely.

M. E. Evashwick; Evashwick, Brieger & Capone, James C. Evans, Pittsburgh, Pa., for appellant Turtle Creek Area School District.

J. Robert Maxwell, Maxwell & Huss, Pittsburgh, Pa., for appellant Churchill Area School District, etc.

R. Stanton Wettick, Jr., Neighborhood Legal Services Assn., Pittsburgh, Pa., for appellees.

Before HUNTER and WEIS, Circuit Judges and BECKER, District Judge.

OPINION OF THE COURT

PER CURIAM:

The underlying action which gave rise to these appeals is a class action brought against the Commonwealth of Pennsylvania, the Pennsylvania State Board of Education, the Allegheny

County Board of School Directors, the Allegheny Intermediate Unit Board of School Directors and various individuals as officials of these bodies. The complaint was filed on June 9, 1971 and alleged that the defendants intentionally and knowingly drew boundary lines for the new consolidated school districts in the central eastern area of Allegheny County, and specifically for the General Braddock Area School District, in a way that perpetuated and maximized racial segregation in violation of the equal protection clause. On May 15, 1973, the district court found in favor of the plaintiffs and ordered the Commonwealth defendants to prepare and adopt a comprehensive plan of school desegregation for that area of Allegheny County.

No appeal from this decision was filed by any of the named defendants, but on June 12, 1973, the Turtle Creek Area School District ("Turtle Creek"), a local school district likely to be affected by the desegregation plan, filed a petition to intervene in the case as a party defendant in order to take an appeal. On June 13, 1973, Churchill Area School District ("Churchill"), a similarly situated local school district, took the same action. These petitions to intervene were denied by the district court on June 13, 1973 and these denials as well as various exceptions to the May 15, 1973 judgment of the district court itself form the basis for appeals No. 73-1783 and 73-1784.

Subsequent to the filing of these appeals, the Commonwealth defendants submitted a proposed desegregation plan to the district court. Turtle Creek and Churchill as well as the other school districts affected under the plan, thereupon filed new petitions to intervene. The district court permitted intervention at this point for the limited purpose of presenting argument on the issues of 1) whether the Commonwealth's plan complied with the district court's order of May 15, 1973 and 2) whether the Commonwealth abused its discretion in choosing the plan it submitted for approval. However, it refused to permit the school boards to intervene as defendants

for all purposes.[1] This denial as it relates to Turtle Creek and Churchill, is the basis for appeals No. 74-1050 and No. 74-1051.[2] These appeals and the earlier ones have been consolidated since they involve the same issues.

[1] While the parties that have brought this appeal have undertaken a broad attack upon the district court's judgment of May 15, 1973, the crucial threshold question is whether their petitions to intervene were properly denied. If they were, Churchill and Turtle Creek are not parties to the action and cannot appeal the judgment of the district court.[3] We have

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[1] Had general intervention been permitted, most of the school boards would have sought to reopen the record so that they could present arguments in opposition to the district court's May 15, 1973 judgment of liability.

[2] Naturally, since the plaintiffs have not filed an appeal, our decision in no way affects the district court's order *granting* limited intervention.

[3] While Churchill and Turtle Creek rely primarily upon their asserted status as intervenors to establish their right to appeal the district court's judgment, they also suggest that this right is established under Federal Rule of Civil Procedure 19 which provides for compulsory joinder of indispensable parties. This argument begins with the local school districts' assertion that they are indispensable parties and that the district court erred when it rejected the named defendants' motion to have them so named. They go on to contend that this question can be raised by this court *sua sponte* so that even if they do not qualify as intervenors, we should still bring them into the action under Rule 19 and permit them to attack the judgment of the district court.

This argument is not meritorious. While courts of appeals have raised questions as to the absence of indispensable parties *sua sponte*, J. Moore, Federal Practice ¶ 19.19 at 2582 they have done so only when an appeal had already been properly brought by one of the parties to the action. *See* cases cited *id.* note 11. We do not feel that it is appropriate to take the same approach in cases such as this, where the only "appeal" to this court has been initiated by non-parties. In these circumstances, we can reach the indispensable party question only if we reach out on our own initiative and upset proceedings before the district court that have proved satisfactory to all of the

Footnote continued on next page.

concluded that the denial of these petitions was proper, and as a result, the appeals will be dismissed.

[2, 3] As the Supreme Court has recently made clear, it is within the discretion of the district court to deny a petition to intervene if it is not timely. NAACP v. New York, 413 U.S. 345, 93 S.Ct. 2591, 37 L.Ed.2d 648 (1973). In the instant case, the untimeliness of the various petitions is clear. The first petition was not filed until June 12, 1973, two years after the case was originally filed, six months after the trial, and almost a month after the district court's opinion and order were filed.

Moreover, the petitioners could not reasonably claim ignorance either of the proceedings or the necessity for intervention at a much earlier date. On May 19, 1982, (more than six months before trial) the Attorney-General of Pennsylvania sent identical letters to Turtle Creek and Churchill that informed them of the suit and noted that the relief requested would have an important effect on the future of their districts.[4] The letter then indicated that the Attorney-General's position in the litigation would have to reflect the interests of the Commonwealth as a whole and that as a result it probably would not reflect the interests of the local school districts. It closed with the following suggestion:

> "I, therefore, urge you to intervene in this action immediately if you wish the viewpoint of your school district and your constituents to be represented and presented before the trier of fact and of law."

Footnote continued from previous page.

present parties to the case. This would create an unwarranted interference with the work of the district courts.

It may be that a non-party's rights are so affected in a particular case that he should have the right to initiate an appeal. However, he must first make himself a party to the action by filing a petition to intervene under Rule 24 and by meeting the requirements that exist for successful intervention. We will not create a procedure that would allow him to circumvent these requirements by petitioning this court directly for a decision that declares him to be an indispensable party under Rule 19.

[4] A copy of the amended complaint accompanied the letter.

This letter, at the very least, put the school districts on notice to be alert to the likely necessity for intervention. Yet despite this clear warning, no petition to intervene was filed until June 12, 1973, six months after the December 1972 trial. Since the necessity for intervention was apparent at least by time of trial,[8] the failure of Turtle Creek and Churchill to act until months later makes the petitions ultimately filed untimely. *See* NAACP v. New York, *supra*. The petitions for intervention filed in June and October of 1973 were properly denied.

The appeal will be dismissed.

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[8] By that time the following papers were of record and available for the school districts' review: Plaintiffs' proposed stipulation of facts; plaintiffs' pretrial statement; County defendants' pretrial statement; Commonwealth defendants' pretrial statement; the pretrial stipulation; and plaintiffs' summary of opinion evidence.

APPENDIX D

Rule 19(a), Federal Rules of Civil Procedure

Rule 19. Joinder of Persons Needed for Just Adjudication

(a) Persons to be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and his joinder would render the venue of the action improper, he shall be dismissed from the action.

24 P.S. § 2-281 et seq. (Act 561)

§ 2-281. Standards for organization of administrative units

The State Council of Education on or before January 1, 1962, shall adopt standards for approval of administrative units taking into consideration the following factors: topography, pupil population, socio-economic characteristics, facility of transportation of pupils, utilization of existing school buildings, existing administrative units and potential population changes.

§ 2-282. Submission of plans

Each county board of school directors, on or before January 1, 1963, shall prepare and submit, to the Department of Public Instruction, a plan of organization of administrative units for the county, conforming to the standards for approval of administrative units adopted by the State Council of Education. No plan of organization of administrative units shall be submitted which violates any written agreement entered into by several school districts for the establishment of a joint school or department, unless the agreement is amended to provide that it shall be discontinued at the time the proposed administrative unit is deemed established as a school district. In preparing its plan, a county board of school directors shall confer with school directors and administrators of all school districts of the county, and may confer with the staff of the Department of Public Instruction and other interested persons. Each plan shall assure the continuity of special education and area technical school programs by providing special education and area technical school attendance areas established in accordance with standards approved by the State Council of Education.

§ 2-283. Approval of plans

When any plan of organization of administrative units for a county is found to conform to the standards for approval of administrative units adopted by the State Council of Education, the Department of Public Instruction shall cause such plan to be placed upon the agenda of the State Council of Education. The State Council of Education shall review all plans placed upon its agenda, and approve such plans as it deems wise in the best interests of the educational system of the Commonwealth. Except in the case of counties of the seventh and eighth classes, no plan of organization of administrative units shall be approved in which any proposed administrative unit contains a pupil population of less than four thousand (4,000), as determined by the average daily membership of such proposed administrative unit for the school year 1960-61, unless where

factors of topography, pupil population, socio-economic characteristics, facility of transportation of pupils, utilization of existing school buildings, existing administrative units and potential population changes are considered by the State Council of Education, a plan of organization of administrative units may be approved in which a proposed administrative unit contains a pupil population of less than four thousand (4,000), as determined by the average daily membership of such proposed administrative unit for the school year 1960-61; but in no event, except in counties of the seventh and eighth classes, shall the State Council of Education approve a plan of organization of administrative units in which any proposed administrative unit contains a pupil population of less than two thousand five hundred (2,500), as determined by the average daily membership of such proposed administrative unit for the school year 1960-61.

§ 2-284. Disapproval of plans

When any plan of organization of administrative units for a county is disapproved by the State Council of Education, it shall be returned to the county board of school directors which submitted the plan for reconsideration, amendment and resubmission in accordance with the recommendations of the State Council of Education.

§ 2-285. Department of Public Instruction to prepare plans

In the event that no plan of organization of administrative units is approved by the State Council of Education for a county prior to January 1, 1964, the Department of Public Instruction shall prepare and place upon the agenda of the State Council of Education a plan of organization of administrative units for the county. When approved by the State Council of Education, such plan shall be deemed the approved plan of organization of administrative units for the county.

§ 2-286. Establishment of reorganized school districts

On July 1, 1965, all administrative units contained in plans of organization of administrative units approved by the State Council of Education shall constitute and be deemed established as school districts, and shall belong to the class to which they are entitled as provided by law.

24 P.S. § 2-290 et seq. (Act 299)

§ 2-290 Purpose, Construction of Subdivision

The purpose of this subdivision is to provide a flexible framework and effective and orderly means whereby the administrative units of the Commonwealth's public school system can be expeditiously reorganized. While deeply impressed with the continuous dedicated responsibility exercised over the last century by the citizenry through their local boards of school directors, the General Assembly must also be cognizant of the responsibility placed upon it by Article X., section 1 of the Constitution of Pennsylvania which requires in part, that "The General Assembly shall provide for the maintenance and support of a thorough and efficient system of public schools, wherein all the children of the Commonwealth above the age of six years may be educated . . .." As the evidence demonstrates beyond reasonable dispute that the present administrative system of more than two thousand (2,000) school districts is incapable of providing adequate education and appropriate training for all of the children of the Commonwealth above the age of six, the General Assembly hereby renews its dedication to its responsibility of providing a thorough and efficient system of public schools within the Commonwealth. It is hereby declared to be the purpose and intention of the General Assembly to establish the procedures and provide for the standards and criteria under which school directors and district administrators and county boards of school directors and county administrators shall have the power and bear the duty of determining the appropriate administrative units to be

created in each county to carry out the responsibilities shared by them and the General Assembly, of educating and training each child within his capacity to the extent demanded by the immediate requirements of growth and strengthening of this Commonwealth and nation. Only where such local officials fail to act, or act arbitrarily outside of the standards and criteria provided for in the sections following, shall the Commonwealth through its duly authorized agencies and officials act to insure compliance with law within the powers set forth below and as restricted therein. The improvements in the educational system hereby obtained are not to be construed as a final resolution of organizational problems. Local school officials as agents of the General Assembly are directed to continually review organizational patterns and adopt without delay all changes which will accelerate the progress of public education. It is further declared to be the purpose and intention of the General Assembly that the above may be used in construing and arriving at legislative intent with respect to the provisions of this subdivision.

§ 2-290.1 Educational performance, standards

To implement the purpose of this subdivision, the State Board of Education, as soon as possible and in any event no later than July 1, 1965, shall develop or cause to be developed an evaluation procedure designed to measure objectively the adequacy and efficiency of the educational programs offered by the public schools of the Commonwealth. The evaluation procedure to be developed shall include tests measuring the achievements and performance of students pursuing all of the various subjects and courses comprising the curricula. The evaluation procedure shall be so constructed and developed as to provide each school district with relevant comparative data to enable directors and administrators to more readily appraise the educational performance and to effectuate without delay the strengthening of the district's educational program. Tests developed under the authority of this section to be administered

to pupils shall be used for the purpose of providing a uniform evaluation of each school district and the other purposes set forth in this subdivision. The State Board of Education shall devise performance standards upon the completion of the evaluation procedure required by this section.

§ 2-291. Standards for organization of administrative units

The State Board of Education, within ninety (90) days of the effective date of this amending act, shall adopt standards for approval of administrative units, taking into consideration the following factors: topography, pupil population, community characteristics, transportation of pupils, use of existing school buildings, existing administrative units, potential population changes and the capability of providing a comprehensive program of education.

§ 2-292. Submission of plans

Each county board of school directors, on or before July 1, 1964, shall prepare a plan of organization of administrative units for the county, conforming to the standards for approval of administrative units adopted by the State Board of Education. The plan shall be submitted to the Department of Public Instruction not less than thirty (30) days nor more than sixty (60) days after it is prepared. Any school district which considers itself aggrieved by the plan may set forth its specific objections in a petition which shall be served by registered or certified mail on the secretary of the county board of school directors. All such petitions filed shall be appended to the plan prior to submission to the Department of Public Instruction. No plan of organiztion of administrative units shall be submitted which violates any written agreement entered into by several school districts for the establishment of a joint school or department, unless the agreement is amended to provide that it shall be discontinued at the time the proposed administrative unit is deemed established as a school district. A plan of organization of administrative units shall be deemed to violate

a written agreement entered into by several school districts for the establishment of a joint school or department only when it formulates an administrative unit which in whole or in part comprises less than all of the school districts joined by such agreement. In preparing its plans, a county board of school directors shall confer with school directors and administrators of all school districts of the county, and may confer with the staff of the Department of Public Instruction and upon written request shall confer with other interested persons. Each plan shall assure the continuity of special education and area technical school programs by providing special education and area technical school attendance areas established in accordance with standards approved by the State Board of Education.

Each county board of school directors which prepared and submitted to the Department of Public Instruction prior to January 1, 1963, a plan of organization of administrative units for the county, shall, in compliance with the provisions hereof, reconsider such plan and submit the same or a revised plan on or before July 1, 1964, irrespective of the action taken on the prior plan. In those cases where the prior plan was approved by the State Council of Education, the plan submitted when approved by the Council of Basic Education shall supersede the prior approved plan as the plan of organization of administrative units for the county.

§ 2-292.1 Independent districts

When an independent district is created by the court of common pleas for purposes of transfer from one school district to another, the court shall submit to the State Board of Education its decree creating such district. Such decree shall be considered an application for the assignment of said district to the designated administrative unit of the approved county plan.

§ 2-293. Approval of plans

(a) When any plan of organization of administrative units for a county is found to conform to the standards for approval

of administrative units adopted by the State Board of Education, the Department of Public Instruction shall cause such plan to be placed upon the agenda of the Council of Basic Education. The Council of Basic Education shall review all plans placed upon its agenda, and approve such plans as it deems wise in the best interests of the educational system of the Commonwealth. Except as hereinafter provided, no plan of organization of administrative units shall be approved in which any proposed school district contains a pupil population of less than four thousand (4,000), unless when factors of topography, pupil population, community characteristics, transportation of pupils, use of existing school buildings, existing administrative units, potential population changes and the capability of providing a comprehensive program of education are considered by the Council of Basic Education as requiring the approval of a plan of organization of administrative units in which one or more proposed school districts contains a pupil population of less than four thousand (4,000). (b) A plan of organization of administrative units for a county shall be approved by the Council of Basic Education. If the plan contains (i) no unit with a pupil population less than that of the unit with the smallest pupil population in the last previous county-wide plan submitted to and approved by the State Council of Education prior to September 12, 1961, and (ii) no more units than were in the aforesaid county-wide plan plus an additional unit for each second class district which was not required to be a part of such county-wide plan and which was not included in an administrative unit thereof. (c) Pupil population as used in this section shall mean the average daily membership for the school year 1961-1962 including kindergarten or grade one through grade twelve.

§ 2-293.1 Independent districts

When a court decree is received creating an independent district for transfer purposes, the State Board of Education shall place such item on its agenda and either approve or disapprove the creation and transfer. If approval is given, the board shall

direct the Council of Basic Education to make the necessary changes in the county plan. If disapproved, the board shall state its reasons for such disapproval and the independent district shall be provided a hearing if it so desires.

§ 2-293.2 Consolidation of municipalities

Whenever the court of common pleas in any county orders the consolidation of any municipalities, it shall serve a copy of its order on the State Board of Education. Upon receipt of such order the board shall direct the Council of Basic Education to make such changes in county plans as may be necessary.

§ 2-294. Disapproval of plans

When any plan of organization of administrative units for a county is disapproved by the Council of Basic Education, it shall be returned to the county board of school directors which submitted the plan for reconsideration, amendment and resubmission in accordance with the recommendations of the Council of Basic Education.

§ 2-295. Department of Public Instruction to prepare plans

In the event that no plan of organization of administrative units is approved by the Council of Basic Education for a county prior to January 1, 1965, the Department of Public Instruction shall prepare and place upon the agenda of the Council of Basic Education a plan of organization of administrative units for the county. When approved by the Council of Basic Education, such plan shall be deemed the approved plan of organization of administrative units for the county.

Any school district which considers itself aggrieved by a plan of organization of administrative units approved by the Council of Basic Education may appeal to the State Board of Education by filing a petition, within thirty (30) days after approval of the plan, setting forth the grounds for such appeal.

A copy of such petition shall be served by registered or certified mail on the secretary of the county board of school directors. The State Board of Education, or its representative, shall fix a day and time for hearing, shall give written notice to all parties interested, and may hear and consider such testimony as it may deem advisable to enable it to make a decision. After reaching its decision, the State Board of Education shall enter such order as appears to it just and proper, either directing the Council of Basic Education to approve the plan in an amended form or confirming the plan in the form previously approved by the Council of Basic Education. The decision of the State Board of Education shall be final, unless an appeal is taken as now provided under the provisions of the "Administrative Agency Law".

§ 2-296. Establishment of reorganized school districts

On July 1, 1966, or on the date of advance establishment, all administrative units contained in plans of organization of administrative units approved by the Council of Basic Education shall constitute and be deemed established as school districts, and shall belong to the class to which they are entitled as provided by law: Provided, however, if any approved administrative unit includes any district or districts of the second, third, or fourth class with any district of the first class A, such district or districts of the second, third, or fourth class shall be merged into and become part of said district of the first class A, and said district of the first class A as thus enlarged shall be the reorganized district and shall be considered as having had continued existence.

24 P.S. § 2400.1 et seq (Act 150)

§ 2400.1 Standards for organization of administrative units

The State Board of Education, within thirty (30) days of the effective date of this act, shall adopt standards for approval of administrative units comprised of those school districts which

are not in an administrative unit established as a school district under section 296 of the act of March 10, 1949 (P.L. 30), as amended, [Act 299] taking into account the following factors: topography, pupil population, community characteristics, transportation of pupils, use of existing school buildings, existing administrative units, potential population changes and the capability of providing a comprehensive program of education.

§ 2400.2 Submission of plans

(a) Within ninety (90) days after the effective date of this act, each county board shall prepare a plan of organization of administrative units limited to those school districts in the county which are not in an administrative unit established as a school district under section (296 of the act of March 10, 1949 (P.L. 30), as amended.(Act 299) The plan of administrative units shall conform to the standards for approval of administrative units adopted by the State Board of Education and shall be submitted to the board not more than thirty (30) days after it is prepared. In preparing its plan, a county board of school directors shall confer with the board of directors of each school district included therein.

(b) The plan of administrative units may include the placement of one or more such school districts in an administrative unit established as a school district under section 296 of the act of March 10, 1949 (P.L. 30), as amended, if the school district established under said act agrees thereto.

§ 2400.3 Consideration of plans

The State Board of Education shall review all plans and approve such plans as it deems wise in the best interests of the educational system of the Commonwealth. No plan of organization of administrative units shall be approved in which any proposed school district contains a pupil population of less than four thousand (4,000), unless when factors of topography, pupil population, community characteristics, transportation of

pupils, use of existing school buildings, existing administrative units, potential population changes and the capability of providing a comprehensive program of education are considered by the State Board of Education as requiring the approval of a plan of organization of administrative units in which one or more proposed school districts contains a pupil population of less than four thousand (4,000). Pupil population as used herein shall mean the average daily membership for the school year 1966-1967 including kindergarten or grade one through grade twelve.

The State Board of Education upon petition of any school district which considers itself aggrieved by a plan of organization of administrative units filed within thirty (30) days after submission thereof shall, fix a day and time for a hearing and may hear and consider such testimony as it may deem advisable to enable it to make a decision. Three (3) or more members of the State Board of Education shall constitute the State board for any hearing held hereunder. After reaching its decision, the State Board of Education shall enter such order as appears, either approving the plan in an amended form or in the form as submitted by the county board of school directors.

If no such petition is filed within thirty (30) days, the plan of organization of administrative units submitted by the county board of school directors shall be deemed approved by the State Board of Education without right of appeal as provided for in section 5 hereafter.

§ 2400.4 Department of Public Instruction to prepare plans

In the event that a county board falls to submit a plan of organization of administrative units or to resubmit in accordance with the recommendations of the State Board of Education as herein provided, the Department of Public Instruction shall prepare a plan which, when approved by the State Board of Education, shall be deemed the approved plan of organization of administrative units for the county.

§ 2400.5 Appeals

Any school district which considers itself aggrieved by a plan or organization of administrative units approved by the State Board of Education under this act shall have the right to appeal therefrom within thirty (30) days after such approval in the court of common pleas of the county wherein the school district is located, by petition setting forth that such approval is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, specifying the grounds upon which it relies. The prothonotary shall forthwith transmit a copy of the appeal petition to the State Board of Education which shall, within ten (10) days after receipt thereof, certify to the court its entire record in the matter in which the appeal has been taken.

The court, after hearing such additional testimony as the parties may wish to present and a consideration of the entire record, shall enter an order either affirming the plan as approved by the State Board of Education or order making such amendments to the plan as the court, in its discretion, shall find necessary or advisable. The order of the court shall be a final order.

Standards for Reorganizations Under Act 299

Commonwealth of Pennsylvania
STATE BOARD OF EDUCATION
Harrisburg

SCHOOL DISTRICT REORGANIZATION 1963

The School District Reorganization Act of 1963, Act No. 299, approved August 8, 1963, directs the State Board of Education to adopt standards for the organization of administrative units. The standards shall serve as the basis for the County Boards of School Directors in formulating plans of organization of administrative units for counties to be submitted to the Council of Basic Education through the Department of Public Instruction on or before July 1, 1964.

Purposes

1. Section 290 of the Act states its purposes as follows:
   a. To provide a flexible framework and an effective and orderly means whereby the administrative units of the Commonwealth's public school system can be expeditiously reorganized.
   b. To establish the procedures and provide for the standards and criteria under which school directors and district administrators and County Boards of School Directors and county administrators shall have the power and bear the duty of determining the appropriate units to be created in each county.
2. In fulfilling these purposes, the General Assembly stated that:

a. The responsibility for educating and training each child within his capacity to the extent demanded by the immediate requirements of growth and strengthening of this Commonwealth and nation is shared by district and county school officials and the General Assembly.

b. Only where such local officials fail to act, or act arbitrarily outside of the standards and criteria provided by law, shall the Commonwealth, through its duly authorized agencies and officials, act to insure compliance within the powers set forth in the law and as restricted therein.

c. Local school officials, as agents of the General Assembly, are directed to review continually organizational patterns and to adopt without delay all changes which will accelerate the programs of public education.

Policies

1. The State Board of Education emphasizes that reorganization mandated by law is an essential step toward a thorough and efficient system of public schools.

2. The State Board of Education aims to stimulate initiative at the local and county levels which will lead to the reorganization of local administrative units into units of sufficient size, having an adequate tax base and a sufficient number of children to operate and maintain a system of public schools capable of providing essential services and facilities, not simply for the immediate present, but to the extent demanded by the future.

3. Responding to this legislative mandate, the State Board of Education, in establishing standards applicable to all County Boards of School Directors, in avoiding rigid requirements to which each must conform. These standards are sufficiently

flexible to enable each county plan to be considered in the light of its appropriateness to local conditions.

Procedures

1. According to Section 292 of the Act, county plans shall be submitted to the Council of Basic Education through the Department of Public Instruction not less than thirty nor more than sixty days after they are approved. A school district which considers itself aggrieved by a plan may set forth its specific objections in a petition which shall be served by registered or certified mail on the secretary of the County Board of School Directors.

2. Section 293 of the Act requires all county plans to be submitted through the Department of Public Instruction to the Council of Basic Education for approval and establishes the legal framework within which the Council of Basic Education *may* and the conditions under which the Council of Basic Education *shall* approve county plans of organization of administrative units. Pupil population of four thousand (4000) is the minimum goal for the size of each administrative unit. However, the Council of Basic Education *may* make exceptions and approve administrative units with a lesser pupil population when required by reason of factors of topography, pupil population, community characteristics, transportation of pupils, use of existing school buildings, existing administrative units, potential population changes and the capability of providing a comprehensive program of education. When approving exceptions from the four thousand (4000) pupil population minimum, the Council of Basic Education may approve such administrative units as it deems in the best interests of the educational system of the Commonwealth.

3. The Council of Basic Education *shall* approve automatically any county plan which contains (1) no unit with a pupil population less than that of the unit with the smallest pupil population in the last previous county-wide plan submitted to

and approved by the State Council of Education prior to September 12, 1961, and (2) no more units than were in the last previous county-wide plan submitted to and approved by the State Council of Education prior to September 12, 1961.

STANDARDS FOR SCHOOL DISTRICT REORGANIZATION

An administrative unit shall:

1. Mean a contiguous geographic area comprising a single system of school administration in which the educational program is under the control of one board of school directors. Exceptions may be made in situations where an administrative unit in the new plan included non-contiguous geographic areas which operated as a part of the administrative unit or as a joint school system on August 8, 1963. Further exceptions may be considered by the State Board of Education on appeals of aggrieved school districts from action of the Council of Basic Education approving a county plan.

2. Offer a comprehensive program of instruction from kindergarten or grade one through grade twelve.

3. Embrace one or more secondary attendance centers supported by one or more elementary attendance centers.

4. Include not less than 4000 pupils in average daily membership as determined for the 1961-62 school year. Exceptions to this requirement may be made in any of the following cases:

   a. The administrative unit is the same as an administrative unit in the last previous county plan approved by the State Council of Education prior to September 12, 1961; provided it is included in a plan which contains (1) no unit with a pupil population less than that of the unit with the smallest pupil population in the last previous county plan submitted to and ap-

proved by the State Council of Education prior to September 12, 1961, and (2) no more units than were in the aforesaid county plan.

b. *Topography.* There shall be no major geographic barrier to the adequate and efficient operation and supervision of the administrative unit.

c. *Pupil Population.* The mandated pupil population has been discussed above with its exceptions; however, in those instances in which a County Board of School Directors considers future student population growth in planning an administrative unit within a county plan, the Department of Public Instruction shall verify the projected pupil population before approval of the plan by the Council of Basic Education.

d. *Community Characteristics.* Community, as used here, indicates an area in which people commonly associate for civic, cultural, business, social, recreational or similar purposes. Race, religion, national origin and differences in the social and economic levels of the population shall not be factors in determining administrative boundaries.

e. *Transportation of Pupils.* In planning administratve units, transportation of pupils must be considered from the standpoint of pupil welfare, bearing in mind distance, duplication of service, travel conditions, undue cost and time in transit.

f. *Use of Existing School Buildings.* Planning shall involve a reasonable use of existing school facilities, avoiding unnecessary new construction.

g. *Existing Administrative Units.* No part of an existing school district may be separated and added to another administrative unit. Where a school district was assigned to two administrative units in the last county

plan approved prior to September 12, 1961, and is currently operating as a member of a joint school system in each of two administrative units, the County Board or Boards of School Directors shall combine the two administrative units involved into one unit or as part of a larger unit, unless (1) the subject district is released from one of the joint agreements, (2) the subject district has voted a merger with one or more districts in one of the units prior to approval of the county plan, (3) an independent district is created of one part of the district or (4) the territory of part of the subject district in one unit is annexed by an adjacent district for school purposes.

h. *Potential Population Changes.* In the planning of administrative units, potential population changes may be considered when the changes are supported by reliable studies of area development, showing expansion of the area and by growth projections verified by the Department of Public Instruction.

i. *Capability of Providing a Comprehensive Program of Education.* The State Board of Education has been directed by the General Assembly to develop by July 1, 1965, an evaluation procedure designed to measure objectively the adequacy and efficiency of the educational programs offered by the public schools of the Commonwealth and to devise performance standards. In the meantime, for the purposes of reorganization planning, "capability of providing a comprehensive program of education" shall mean: the ability to educate and train each child within his capacity to the extent demanded by the immediate requirements of his growth and his relationship to the strengthening of this Commonwealth and nation and

shall include, but not be limited to, wealth per pupil, qualifications of professional staff, enrollment and diversification of curricula.

Each plan developed by a County Board shall assure the continuity of special education and area technical school programs previously established in accordance with standards approved by the State Board of Education.

County plans shall provide for the inclusion of all the area within a county into one or more administrative unit.

County plans may, with the concurrence of the County Board or County Boards of School Directors of an adjacent county or counties, include contiguous areas across county lines.

Guiding Principles

The State Board of Education declares to the County Boards of School Directors the following guiding principles of and requirements for operation:

1. Emphasis should be placed upon dedicated responsibility of local school officials in providing for a thorough and efficient system of public schools, rather than upon the mechanics of reorganization. It appears that the intent of the General Assembly to improve this public school system is very strong —and reorganization is a means to such an improvement, and not an end in itself. Therefore, all districts, whether reconstituted or not, shall have the responsibility of conducting the best possible program for the students who are enrolled.

2. In preparing its plans, a County Board of School Directors shall confer with school directors and administrators of all school districts of the county.

   a. For guidance, the County Boards of School Directors and the county administrators may confer with the staff of the Department of Public Instruction.

b. Upon written request, county officials shall confer with other interested persons.

c. County Boards of School Directors shall consult with local school officials, giving all school districts an opportunity to be heard.

3. In the event that districts feel that they have been aggrieved by a county plan, such distr may set forth their specific objections in a petition which shall be served by registered or certified mail on the secretary of the County Board of School Directors. All such petitions filed with the County Board of School Directors shall be appended to the plan prior to submission of the plan to the Department of Public Instruction.

4. Any school district which considers itself aggrieved by a county plan as approved by the Council of Basic Education, whether or not the plan of administrative units was approved automatically, may appeal to the State Board of Education by filing a petition within thirty days after approval of the plan, setting forth the grounds for such appeal. The procedure for appeal and hearing is provided in law. After reaching its decision, the State Board of Education shall enter such order as appears to it just and proper, either directing the Council of Basic Education to approve the plan in an amended form or confirming the plan in the form previously approved by the Council of Basic Education. The power of the State Board to enter such order as appears to it just and proper has special significance in those cases where the Council of Basic Education was required by the Act to approve a plan. The requirements upon the Council for approval do not restrict or limit the State Board of Education in reviewing plans once an appeal is taken to it.

5. It is to be hoped that some administrative units contained in approved county plans will take advantage of the provisions of Section 297 of the Act to establish the new school

district in advance of July 1, 1966. Advance establishment will result in financial benefits to the newly established school districts which thereby gain eligibility for supplemental payments. Advance establishment will be possible on July 1, 1964, provided all precedent administrative steps are taken in time to complete the necessary preparations prior to July 1, 1964. The convention of school directors of the component school districts forming the administrative unit to be established in advance should meet for the purpose of selecting an interim operating committee as soon as possible after receiving certification for advance establishment from the Superintendent of Public Instruction. In case of advance establishment, there is no specific deadline for such convention of school directors to be held. However, the number of preparatory steps to be taken requires the earliest possible action to allow sufficient time for adequate preparation. The staff of the Department of Public Instruction will provide consultative and advisory services to administrative units planning to establish in advance.

Commonwealth of Pennsylvania
DEPARTMENT OF PUBLIC INSTRUCTION
Harrisburg

STANDARDS FOR APPROVAL OF ADMINISTRATIVE UNITS 1968

The School District Reorganization Act of 1968, Act 150, approved July 8, 1968, directs the State Board of Education within thirty days of the effective date of the act, to adopt standards for approval of administrative units comprised of those school districts which are not in an administrative unit established as a school district under Section 296 of the Act of March 10, 1949, P. L. 30, as amended.

The plans of administrative units prepared by county boards of school directors under the provisions of Act 150, the Act of July 8, 1968, shall conform to the following standards and exceptions adopted by the State Board of Education on July 11, 1968.

Delimitations

1. The plans of administrative units submitted under this act shall be limited to those school districts which are in administrative units that have not established under the provisions of Act 299, the Act of August 8, 1963.

   Exception: One or more school districts established under the provisions of Act 299, may be included in an administrative unit planned under this act only if the school district established under Act 299 agrees to the assignment.

Standards for Approval

1. An administrative unit shall be defined as a geographic area under the control of a single board of school directors.

2. An administrative unit shall be planned as a contiguous geographic area. Exceptions to contiguity may be made only in situations where the administrative unit in whole or in part includes a noncontiguous, geographic area which had been previously approved by the State Board of Education as an administrative unit or had operated as an administrative unit, a school district or joint school system during the 1967-1968 school year.

3. An administrative unit shall be planned to offer a full program of instruction, kindergarten or grade one through twelve, and provide administrative leadership, supervision and instruction at a reasonable cost consistent with the local taxable wealth and State financial support available per pupil.

4. An administrative unit shall make available an educational program and educational opportunities to meet the varying needs, aptitudes, abilities, and interests of individuals residing in the administrative unit.

5. An administrative unit shall embrace one or more secondary attendance centers and supporting elementary attendance centers.

6. An administrative unit shall be planned to include the largest feasible pupil population which assures the maximum efficiency of operation, and which justifies curricular offerings and other essential services not economically possible in smaller administrative units.

7. An administrative unit meeting or exceeding the mandated 4,000 pupil average daily membership as determined for the 1966-1967 school year and any administrative unit

proposing a reduction of the mandated minimum pupil population shall be planned with consideration of, but not limited to, the following factors:

a. *Topography.* An administrative unit shall be planned so that all parts of the unit are reasonably accessible for efficient operation and supervision.

b. *Pupil Population.* Pupil population changes may be considered in the planning of administrative units when the changes are supported by reliable studies of area development showing past pupil population trends and future projections based on recognized statistical methods. Examples of reliable studies of area development are those made by planning commissions, public utility companies and established survey agencies.

c. *Community Characterisitcs.* Consideration should be given to whether a geographic area has developed characteristics of a community. Community, as used here, includes one or more municipalities and the surrounding territory from which people come for business, social, recreational, fraternal or similar reasons. Neither race or religion shall be a factor in determining administrative unit boundaries and differences in the social and economic level of the population shall not be a basis to determine these boundaries.

d. *Transportation of Pupils.* Distances traveled, travel conditions, time consumed, and the safety and general welfare of the pupils should be basic considerations in developing administrative units. Planning of transportation systems should avoid duplication and, insofar as practical, the transportation of pupils through the area of an adjacent administrative unit.

e. *Use of Existing School Buildings.* An administrative unit shall utilize existing buildings to the maximum extent practical avoiding unnecessary new construction where possible.

f. *Existing Administrative Units.* No part of an existing school district may be separated and added to another administrative unit, except as provided in Act 383, approved December 19, 1967, or as provided in the annexation laws. Administrative units already established as school districts under Act 299 may be included in administrative units planned under this act only if the existing school district so established, grants consent.

g. *Potential Population Changes.* Population changes may be considered in the planning of administrative units when the changes are supported by reliable studies of area development showing expansion of the area and by growth projections based on recognized statistical methods. Examples of reliable studies of population growth beyond a normal projection are those made by planning commissions, public utility companies, and established survey agencies.

h. *Capability of Providing a Comprehensive Program of Education.* For purposes of reorganization planning, capability of providing a comprehensive program of education" shall mean: The ability to educate and train each child within his capacity to the extent demanded by the immediate requirements of his growth and his relationship to the strengthening of this Commonwealth and nation, and, shall include, but not be limited to, wealth per pupil, qualifications of professional staff, enrollment and diversification of curricula.

APPENDIX E

In the
COURT OF COMMON PLEAS OF ALLEGHENY
COUNTY, PENNSYLVANIA
Civil Division

In Re: Appeal of the School District of the Borough of Rankin from Plan of Reorganization of Administrative Units by State Board of Education Forming Unit 16	SA 544 of 1969
In Re: Appeal of the School District of the Borough of North Braddock from Plan of Reorganization of Administrative Units by State Board of Education Forming Unit 16	SA 556 of 1969
In Re: Appeal of the School District of the Borough of Braddock from Plan of Reorganization of Administrative Units by State Board of Education Forming Unit 16	SA 559 of 1969

OPINION

McKENNA, *J.*

These cases arise under the School District Reorganization Act, No. 150 of July 8, 1968, P.L. ____ (24 P.S. 2400.1, et. seq.). The Act requires each County Board of School Directors in the State to submit to the State Board of Education a plan for reorganization of districts within the County. The State Board may then affirm or modify the plan. The objective of the legislature is to reduce the number of districts in the State, and to require that there be at least 4,000 students in each administrative unit. There are exceptions to this requirement, which are hereinafter noted and discussed. Administrative units must conform to certain standards promulgated by the Department of Public Instruction of the Commonwealth.

In the case at bar, the State Board, adopting a plan which had been submitted by the Board of School Directors of Allegheny County, with certain exceptions not here material, placed the School Districts of the Boroughs of Rankin, Braddock and North Braddock in a single administrative unit known as Unit 16.

Each district appealed to the State Board of Education, where each was afforded a hearing. The State Board affirmed the County plan. Further appeals were prosecuted to this Court as authorized by Act 150. The three cases were consolidated for trial purposes and were heard on February 2, 1970.

The Allegheny County plan creates twelve units containing twenty-seven school districts. Almost without exception, the school districts involved appealed to this Court from the action of the State Board approving it. The three cases captioned above were the first to be tried. Accordingly, we will state in this opinion the legal background of the proceedings and a discussion of the Constitutionality of Act No. 150. The conclusions reached here on this issue will be applicable to all of the appeals filed.

In brief, the Constitution of Pennsylvania places on the General Assembly the obligation to provide for the maintenance and support of a public school system in the Commonwealth. In 1949, the legislature adopted a public school code governing all phases of education. This provides that each municipality in the Commonwealth shall constitute a separate school district, and it classifies them according to population into five categories. In 1961, the legislature first stated its goal of having at least 4,000 pupils in each administrative unit. The 1961 Act was replaced by that of 1963, which in turn was superseded by the 1968 statute. Each of these was an amendment of the school code of 1949. In order to create districts with the required pupil population, it was necessary to combine several into one. This action provoked much controversy. Parents were understandably reluctant to permit the important

matter of education to be administered by persons outside of their own communities. They are distrustful of change. Not all educators accept the principle that a larger district promotes efficiency, to which this Commonwealth adheres.

The Constitutional and statutory provisions and the procedures in the case at bar are hereinafter stated in more detail.

The Constitution of 1874, Article X, section 1, reads in part as follows:

> "The General Assembly shall provide for the maintenance and support of a thorough and efficient system of public schools" . . .

Prior to this date, education was provided by local district. This sytem had been in operation for forty years, and yet, it appeared that a large percentage of adult Pennsylvanians were illiterate. Accordingly, the Constitutional provision was adopted. (See *School District of Beallsville*, 21 c.c. 642, 1897)

The above section was replaced by Article III, section 14 of the 1969 Amendment to the Constitution, which reads:

> "The General Assembly shall provide for the maintenance and support of a thorough and efficient system of public education to serve the needs of the Commonwealth."

By Act of May 18, 1911, P.L. 309, the legislature established a public school system. This was succeeded by the Public School Code of March 10, 1949, P.L. 30 (24 P.S. 1-101, et. seq.), which adopts a comprehensive plan of education in the State. This, as has been noted, provides that each municipality shall constitute a separate district (24 P.S. 2-201). It classifies them according to population, bestows on them powers and duties, and authorizes mergers into "Union School Districts".

By Act of September 12, 1961, P.L. 1283, No. 561 (24 P.S. 2-281), the legislature provides for the reorganization of school districts. This requires the State Council of Education to adopt standards for administrative units prior to January 1, 1962.

Each County Board of School Directors is compelled to submit a plan to the Department of Public Instruction prior to January 1, 1963. The Act provides that no plan shall be approved in which any proposed unit contains less than 4,000 pupils, unless factors of topography, pupil population, socio-economic characteristics, facility of transportation of pupils, utilization of existing school buildings, existing administrative units and potential population changes are considered by the State Council to warrant a smaller unit.

This Act contained no right of appeal. It was replaced by the Act of August 10, 1963, P.L. 564, No. 299. Section 290 of this Act contains a detailed statement of its purpose. This we consider to be an important feature of the law, and we quote it as follows:

> "The purpose of this subdivision is to provide a flexible framework and effective and orderly means whereby the administrative units of the Commonwealth's public school system can be expeditiously reorganized. While deeply impressed with the continuous dedicated responsibility exercised over the last century by the citizenry through their local boards of school directors, the General Assembly must also be cognizant of the responsibility placed upon it by Article X., section 1 of the Constitution of Pennsylvania which requires in part, that 'The General Assembly shall provide for the maintenance and support of a thorough and efficient system of public schools, wherein all the children of the Commonwealth above the age of six years may be educated . . .' As the evidence demonstrates beyond reasonable dispute that the present administrative system of more than two thousand (2,000) school districts is incapable of providing adequate education and appropriate training for all of the children of the Commonwealth above the age of six, the General Assembly hereby renews its dedication to its responsibility of providing a thorough and efficient system of public schools within the Commonwealth. It is hereby declared to be the purpose and intention of the General Assembly to establish the procedures and provide for the standards and criteria under

> which school directors and district administrators and county boards of school directors and county administrators shall have the power and bear the duty of determining the appropriate administrative units to be created in each county to carry out the responsibilities shared by them and the General Assembly, of educating and training each child within his capacity to the extent demanded by the immediate requirements of growth and strengthening of this Commonwealth and nation. Only where such local officials fail to act, or act arbitrarily outside of the standards and criteria provided for in the sections following, shall the Commonwealth through its duly authorized agencies and officials act to insure compliance with law within the powers set forth below and as restricted therein. The improvements in the educational system hereby obtained are not to be construed as a final resolution of organizational problems. Local school officials as agents of the General Assembly are directed to continually review organizational patterns and adopt without delay all changes which accelerate the progress of public education. It is further declared to be the purpose and intention of the General Assembly that the above may be used in construing and arriving at legislative intent with respect to the provisions of this subdivision."

This Act also requires the State Board of Education to adopt standards and County Boards to submit plans. Again, it provides for a pupil population of at least 4,000 in each administrative unit, with the proviso for smaller units, as expressed in the Act of 1961. The statute contains this clause (24 P.S. 2-293(b):

> "A plan of organization of administrative units for a county *shall be approved* by the Council of Basic Education, *if the plan contains (1) no unit with a pupil population less than that of the unit with the smallest pupil population in the last previous county wide plan* submitted to and approved by the State Council of Education prior to September 12, 1961" . . . (emphasis added)

Also, this paragraph in section 296:

> "On July 1, 1966 or on the date of advance establishment, all administrative units contained in plans of organization of administrative units approved by the Council of Basic Education shall constitute and be deemed established as school districts, and shall belong to the class to which they are entitled as provided by law:" . . . (24 P.S. 2-296)

Appeals to the State Board of Education are allowed by the Act and further appeals to the Dauphin County Court under the Administrative Agency Law.

That Court became flooded with such appeals, and the 1963 statute was replaced by Act No. 150 of July 8, 1968, P.L. ____ (24 P.S. 2400.1, et. seq.). This provides that:

> "The State Board of Education within 30 days of the effective date of this act, shall adopt standards for approval of administrative units comprised of those school districts which are not in an administrative unit established as a school district under section 296 of the Act of March 10, 1949 (P.L. 30) as amended" . . . (Act 299 of 1963, 24 P.S. 2-296).

It has been alleged herein that this section renders Act 150 unconstitutional and void, since it does not apply to all districts in the Commonwealth, but only to those not in an administrative unit established under prior law. We will discuss this question first, since, if the law is void there will be no need to consider the merits of the case.

CONSTITUTIONALITY OF ACT 150

This Act has been held unconstitutional in two opinions from the Court of Common Pleas of Crawford County. *In the matter of the Appeal of Borough of Cambridge Springs School District, et. al.*, Nos. 146-149 inclusive, February Term, 1969, the Honorable F. Joseph Thomas, in an opinion dated February 2, 1970, held the statute invalid. Also, in an opinion of the

same date, President Judge P. Richard Thomas reached this result in the case of *Appeal of School District of Sparta Merged*, No. 151 May Term, 1969. The bases for these opinions is that the Act contravenes Article III, section 32 of the Pennsylvania Constitution prohibiting special legislation; and that it violates the *Statutory Construction Act* of May 28, 1937, P.L. 1019, section 96 (46 P.S. 596).

The Pennsylvania Constitution, as amended to January 1, 1969, provides in part as follows, Article III, section 32:

> "The General Assembly shall pass no local or special law in any case which has been or can be provided for by general law and specifically, The General Assembly shall not pass any local or special law: (1) regulating the affairs of counties, cities, townships, wards, boroughs or school districts:"

President Judge Thomas held Act 150 unconstitutional on the ground that it is special legislation. It applies only to those school districts which are not in an administrative unit established as a school district under section 296 of the Act of March 10, 1949, P.L. 30, as amended; (i.e. Act 299 of 1963).

The Honorable F. Joseph Thomas in the *Cambridge Springs School District* case, reached the same conclusion as did his colleague in the *Sparta* case.

A consideration of the various statutes governing reorganization indicates that the legislature adopted a consistent pattern of rules. The *School Code of March 10, 1949*, P.L. 30, section 201 (24 P.S. 2-201), provides in part as follows:

> "All school districts shall remain as now constituted until changed as authorized by this Act. Except as otherwise now or hereafter constituted, each city, corporate town, borough or township in this Commonwealth now existing or hereafter created shall constitute a separate school district" . . .

This Act provided for mergers (section 261), and in section 262 it directed that each county should submit a plan for

the reorganization of school districts therein. However, the provision for 4,000 pupils in each district first appears in the 1961 statute.

By Act of September 12, 1961, P.L. 1283, No. 561(24 P.S. 2-283), each county board is required to submit a plan for the organization of administrative units, each to contain at least 4,000 pupils, unless factors of topography, pupil population, socio-economic characteristics, facility of transportation of pupils, utilization of existing school buildings, existing administrative units and potential population changes dictate a lesser number. This Act did not bring about the result desired and was much criticized, particularly on the ground it contained no right of appeal. It was superseded by Act 299 of August 8, 1963, P.L. 564 (24 P.S. 2-290, et seq.). This statute is confusing, and at least one section is susceptible of more than one construction. Its provisions are thoroughly analyzed in an opinion by President Judge Ervin of the Superior Court in the case of *State Board of Education v. Franklin Twp. Sch. Dist.*, 209 Pa. Super. 410 (1967).

Section 293(a) of Act 299 of 1963, provides that County plans shall be submitted to the Council of Basic Education. The Council is directed to approve such plans as it deems wise. No plan is to be approved if it contains less than 4,000 pupils, unless considerations of topography, etc. warrant a smaller unit. Subsection (b), as quoted above, provides that a plan shall be approved if it contains no unit with a pupil population less than that of the unit with the smallest pupil population approved prior to September 12, 1961.

Section 295 provides that a school district which considers itself aggrieved by a plan of organization of administrative units approved by the Council of Basic Education may appeal to the State Board of Education, which is authorized to either approve or amend the plan. Further appeals are allowed to the Dauphin County Court under the provisions of the "Adminis-

trative Agency Law". Section 296 also quoted above provides that units contained in plans approved under prior law shall be deemed to be established districts.

Section 297 reads in part:

> "(a) Any administrative unit contained in a plan of organization of administrative units approved by the Council of Basic Education may constitute and be deemed established as a school district on July 1, 1964, or on July 1, 1965 when the following conditions have been satisfied: (1) All appeals to the State Board of Education from the Council of Basic Education approving the plan of organization of administrative units have been finally determined" . . .

It will be noted that section 293(b) is mandatory. It *directs* the Council of Basic Education to approve a plan which contains no unit with a pupil population less than that of the unit with the smallest pupil population in the last previous county wide plan approved by the Council of Basic Education prior to September 12, 1961. Yet decisions of the Council may be appealed to the State Board of Education, and thence further to the Dauphin County Court. The question arises as to whether appeals lie from decisions made under subsection 293(b), since its provisions are mandatory. President Judge Ervin held in *State Board of Ed. v. Franklin Twp. Sch. Dist.*, 209 Pa. Super. 410 (1967), that appeals do lie to the State Board from decisions made under subsection (a) or (b) of section 293 of the Act of 1963. And, of course, further appeals lie to the Dauphin County Court.

In the Crawford County cases, it is held that the provisions of section 293(b) are mandatory, and that if any unit could show that it had at least as many pupils as a certain type of unit organized prior to September 12, 1961, it had an absolute right to exist.

Act No. 150 of 1968 provides for the reorganization of all units, except those organized under the Act of 1963. The

Crawford County cases hold this to be special legislation, and therefore unconstitutional and void. It appears in the *Sparta* case, that that district was included in an Erie County plan and attached to Corry Area. Sparta appealed to the State Board of Education. It was there unsuccessful, and an appeal was taken to the Commonwealth Court. The appeal was pending in that Court when Act 150 was passed. The Commonwealth Court dismissed the appeal as moot. Sparta was then merged with other districts under Act 150. It appealed from the order of merger to the Crawford County Court of Common Pleas under the provisions of section 5 of Act 150. That Court held Act 150 to be special legislation, unconstitutional and void on this ground: that other units in Erie County contained less than 4,000 pupils, but were approved because they contained at least as many as were in the smallest unit organized prior to September 12, 1961, i.e. the School Code of 1949, as amended in 1953. The Court held that Sparta was entitled to this same right.

The Crawford County Court referred the case back to the State Board of Education, directing that if Sparta met the provisions of section 293(b) of Act 299, it should be permitted to stand alone.

In the *Cambridge Springs School District* case, Judge F. Joseph Thomas also held Act 150 to be void. He directed that the plan for Crawford County submitted under Act 299 and approved by the Council of Basic Education, be reinstated.

Counsel for the State Board argues that while section 293(b) of Act 299 is mandatory on the Council of Basic Education, it is not necessarily directive as to the State Board; as appeals are allowed from the action of the Council to the State Board. Therefore, its provisions are the same as those of Act 150. The State Board has the final determination under both Acts. The provisions of the two laws are the same, except as to the Court entertaining appeals, Dauphin County Court under

Act 299 and the local Court of Common Pleas under Act 150. If this is so, Act 150 is not unconstitutional. School districts have precisely the same rights under both statutes.

We do find that Act 150 is Constitutional, but we prefer not to base our decision on this argument.

The Crawford County cases hold that Act 150 contravenes the provision of section 96 of the Statutory Construction Act of May 28, 1937, P.L. 1019, (46 P.S. 596). That section reads as follows:

> "The repeal of any civil provisions of a law shall not affect, or impair any act done, or right existing or accrued, or affect any civil suit, action or proceeding, pending to enforce any right under the authority of the law repealed. Such suit, action or proceeding shall and may be proceeded with and concluded under the laws in existence when such suit, action or proceeding was instituted, notwithstanding the repeal of such laws, or the same may be proceeded with and concluded under the provisions of the new law, if any, enacted."

We do not understand why this section should not be given effect. The Judges Thomas hold that Act 150 deprived the districts which had cases pending before the Dauphin County Court of the right to appeal. We reach a contrary result. Section 96 of the Statutory Construction Act *preserves* the right of appeal. Assuming that section 293(b) is mandatory, any district meeting the standards set in the section had a right to exist. If the Council of Basic Education and the State Board denied this right, then the aggrieved district had a right to appeal to the Dauphin County Court under the Statutory Construction Act. As we understand the facts, that Court dismissed appeals pending before it for practical reasons. It had so many cases it could not handle them, and dismissed them on the ground that Act 150 made them moot. The aggrieved districts had, of course, a right to appeal to the Supreme Court from the order of the Dauphin County Court.

Therefore, every district organized under Act 299 had equal rights with every other district so organized. Each could appeal or accept the provisions of Act 150. This is almost identical with Act 299. It does omit the clause contained in section 293(b) of that statute and changes the Court to which appeals lie, from Dauphin County to the Court of Common Pleas of the county wherein the aggrieved district is located.

It also by-passes the Council of Basic Education, that is, it provides that the State Board shall examine county plans in the first instance, approve or amend them, and afford hearings to districts which consider themselves aggrieved.

Viewed in this light, Act 150 does not constitute special legislation. All school districts were treated in the same manner under Act 299. If any were not satisfied with the disposition of their cases by the Council of Basic Education or the State Board under that law, they could appeal. If they waived this, they must be held to have accepted the provisions of Act 150, which in fact is substantially the same as Act 299.

We have been referring to "rights" of school districts. This term connotes an advantage. It is, of course, debatable as to whether large or small districts provide better education for pupils. The legislature has determined that large units are preferable. It would seem that local districts are bound by that finding. If then large districts provide better education, the act of a district in remaining small is harmful to the pupils therein. It can scarcely be said that districts are, in any case, being deprived of the "right" to remain small.

There are many reasons favoring a finding of Constitutionality of any Act of the legislature, particularly one involving school districts.

Every Act of the legislature is presumed to be valid, and it will be declared invalid only for compelling reasons. In *Minsinger v. Rau*, 236 Pa. 327 (1912), the Supreme Court, in considering the 1911 Act, said:

> "The Act of May 18, 1911, P.L. 309, called the School Code, was the product of the deliberate thought of a commission of prominent citizens of the Commonwealth who worked upon the statute for several years; after prolonged consideration it passed two legislatures before final approval by the governor, and we are now asked to set it aside as unconstitutional. This we should not and cannot do unless the alleged breaches of the fundamental law are so glaring that there is no escape."

We find no glaring breaches of the fundamental law in the case at bar.

Actually, we have found no district which asserted to us that it had a right to exist as a small unit under section 293(b) of Act No. 299.

The Constitution places on the legislature the obligation of providing for the education of children up to college. The legislature has set a goal of at least 4,000 pupils per administrative unit. In section 3 of Act 299, it is stated that:

> "The purpose of this subdivision is to provide a flexible framework and effective and orderly means whereby the administrative units of the Commonwealth's public school system can be expeditiously reorganized."

Later in the section, this clause appears:

> "Local school officials, as agents of the General Assembly, are directed to continually review organizational patterns and adopt without delay all changes which will accelerate the progress of public education."

It is clear then that the legislature is in control of education. It desires larger units, and has directed that local districts cooperate with it in bringing about the desired result. Instead of doing this, the local districts are appealing to the Courts to be allowed to remain small. In *Chartiers Valley Joint Schools v. Allegheny County Board*, 418 Pa. 520 (1965), it was held that Act 299 of 1963 was Constitutional. In a concurring opinion, Mr. Justice Cohen said (p. 548):

"How is it that the school district, the creature of the Legislature, given life for the sole purpose of carrying out the Legislature's duty to provide education in the manner directed by the Legislature, can attack the Legislature's directions for discharging its duty? Certainly the Legislature has not given the school district *the duty* of making sure that the Legislature acts constitutionally. And the school district has no powers that are not either expressly conferred upon it by the Legislature or implied from the nature of its duties."

Act 150 does give to local districts the right to appeal, so we do not deny the appeals in the cases at bar on this ground. However, we believe that local boards do have a duty to cooperate with the Commonwealth.

The State has found that small units cannot provide adequate education to pupils to enable them to compete in the modern world. This thesis may be open to argument, but it is very persuasive to us. In any event, we are bound to accept the State's judgment in the matter. The mergers ordered should benefit all the pupils in the several units. We cannot believe the State would insist on a program which will be harmful to the pupils whose education is entrusted to it by our basic law.

THE ADDITIONAL TESTIMONY IN COURT

It has been argued that the Court may not receive additional testimony notwithstanding that Act No. 150 directs to the contrary. This assertion is made because the Statute requires that the adjudication of the State Board be affirmed unless the Board abused its discretion. And obviously, the Board cannot be convicted of an abuse of discretion because of testimony it never heard. There is certainly logic to this argument. However, we do not believe that this reasoning requires us to exclude testimony not produced before the Board. The only question before the Court is whether or not the Board abused its discretion; in other words, was its decision sound or arbitrary

and capricious. If the latter, it must be set aside, even though the basis for this action is evidence which was not produced before it.

Also, we have found in the cases heard by us, that any additional evidence produced was not of such nature as to warrant a reversal of the Board's action. Any change required, in our judgment, in the Board's adjudication was made necessary by evidence produced before the Board itself, and not by additional evidence.

THE CASE ON ITS MERITS

We will now recite the procedures followed in the case at bar and the positions taken by the three appellant school districts and by counsel for the State Board in support of its action.

Section 5 of Act 150 provides in part:

> "The Court after hearing such additional testimony as the parties may wish to present and a consideration of the entire record, shall enter an order either affirming the plan as approved by the State Board of Education, or an order making such amendments to the plan as the court in its discretion shall find necessary or advisable. The order of the Court shall be a 'final order'."

Accordingly, we will consider the record made before the State Board and the testimony produced at the Court Trial.

As required by Act 150, the State Board of Education published Standards for Approval of Administrative Units. These follow closely the mandates of the Statute and contain more extensive guidelines than are expressed in the legislation. Even these, however, are very general in tenor. For example, No. 6 reads:

"6. An administrative unit shall be planned to include the largest feasible pupil population which assures the maximum efficiency of operation, and which justifies curricular offerings and other essential services not economically possible in smaller administrative units."

The Allegheny County Board of School Directors prepared a plan of organization of administrative units. This was transmitted to the State Board of Education by covering letter of October 7, 1968. The County Board certified that it had taken action pursuant to law in adopting the plan. It forwarded to the State Board the following documents:

1. Resolution adopted by County Board;
2. Certifications of action by County Board;
3. Administrative Unit Data Sheets (one for each unit); and
4. Maps of Units and Attendance Centers.

The three school districts involved in this appeal are contained in Administrative Unit No. 16.

The Data Sheet pertaining to the unit, as prepared by the County, indicates that there are therein, 4,110 pupils; that the population is 30,705; that the market value of property in the unit is $100,429,300.00. It covers an area of 2.64 square miles. Each district has two high schools. Rankin has one elementary school building, Braddock two, and North Braddock three. There are 349 high school students in Rankin, 730 in Braddock and 1,159 in North Braddock. In the elementary schools there are enrolled in Rankin, 407 students, in Braddock 658, and in North Braddock 1,222. The total number now enrolled in the schools is 4,525. This is 415 more than the average daily membership (A.D.M.) in the schools according to the County plan.

Each of the three districts petitioned the State Board of Education for a hearing, alleging that it was aggrieved by the

proposal. The Board conducted a hearing on the matter on February 25, 1969, and on May 9th of the same year.

The testimony before the State Board developed these points.

NORTH BRADDOCK

North Braddock desires to remain alone. It is an old, well established area and possesses the capability of providing a comprehensive educational program for its pupils.

Rudolph Celigoi testified in support of North Braddock's position. He is Assistant Superintendent of Schools of the Borough. He described the school buildings in the municipality. Thirty per cent of their graduates go on to college or to junior college. Probably the program is slanted in favor of those who seek employment, immediately on graduation from high school. A merger will require new patterns of community loyalty. Existing buildings will not be used as efficiently as at present. Transportation will be required for pupils. This would mean added expense. Cafeterias, not now in existence, will be necessary.

Robert R. Bowman also supported the Borough's position. He is Director of Guidance and Counseling. He described the work conducted in the district in his field. The area is socio-economically disadvantaged. However, with financial aid from the State and Federal Government, it can solve its own problems.

RANKIN

Counsel for Rankin stated frankly, that the district cannot continue to exist alone because of financial problems. It would, however, prefer to be merged with Swissvale rather than be in the Unit to which the State Board assigned it.

Morris Silverstein, Superintendent of Rankin Schools, described conditions in the borough. Notwithstanding the financial problem, the schools have excellent facilities and furnish a fine curriculum. It will be an asset to any unit in which it is placed. It is a poverty area however. Six hundred and thirty-three students are from culturally deprived homes, that is, from homes where the annual income is under $3,000.00. The real estate tax is 34 mills. There should be a cafeteria in a poverty stricken school district to aid needy students to acquire proper nutrition. However, there is no such facility in Rankin. This witness suggested that the State supply the finances necessary to permit Rankin to remain as an independent administrative unit.

BRADDOCK

The position of Braddock school district is that it desires to remain as an independent unit. The County plan allows other small districts to remain alone and Braddock should be afforded the same right. The schools constitute the center of activities in the borough.

Michael O'Toole is Superintendent of Braddock Schools. He testified in support of the district's position. He described the physical plant, which is being used to 100% of its capacity. No transportation is required, except to Forbes Trail School, which is not part of the school system, but which offers technical courses to its pupils. No cafeterias are needed. The disadvantages to the proposed merger are that it will require the transportation of pupils to and from schools at added expense. Based on the number of families with annual incomes of $2,000 and less, this is the No. 1 poverty area in Allegheny County. There are 3,500 families in the municipality, and 600 of these receive public assistance. The school district, however, is very stable and meets the needs of the community. The proposed merger of the three districts would not be economically sound.

Michael J. Sullivan testified to the same effect. This is an industrial community. United States Steel contemplates additional building in the borough in the near future. The assessed property in the municipality will be sufficient to support an adequate school system.

Rev. Albert Minney and Rev. Leo G. Henry, the latter in charge of the Catholic parochial school in the area, both testified in support of Braddock's position. The clergymen are members of a Citizen's Advisory Committee to the school board. They favor neighborhood control of the school system.

The State Board handed down its Adjudication on May 9, 1969. It held that the merged unit meets the minimum requirement of 4,000 pupils and that none of the three districts can meet this goal now or in the foreseeable future. Also, that although each district has distinctive and noteworthy programs, none has the capacity to provide a comprehensive program of quality education as envisioned as the legislative goal of Act 150.

The Board concluded that the plan will advance education in the community, and that it conforms to statutory requirements. In its discussion, the Board indicates that there are no topographical barriers to common administration, and that,

> "In this proposed unit there is afforded maximum flexibility in planning for future needs under a common administration."

This is true as to transportation, cafeteria service, educational opportunities and financing.

The testimony on appeal to this Court from the Board's ruling was heard on February 2, 1970.

Charles Belavich of Rankin, a member of its School Board, testified that because of its location and boundary lines, Rankin would be better off with Swissvale and possibly Edgewood. Rankin is in financial distress.

Dr. Charles Bair, Superintendent of County Schools, testified that he had supplied data to the Allegheny County Board for use in developing its plan, but that he had made no recommendation. He said that under Act 299 of 1963, the County plan indicated a unit composed of Braddock, North Braddock, Braddock Hills, East Pittsburgh and Rankin.

Dr. Norman Johnson testified in opposition to the plan. He is a highly educated man and is Professor of Urban Processes and Public Affairs at Carnegie-Mellon University. The gist of his testimony is that all three areas are in financial distress, and that only by combining the districts under discussion with more prosperous areas will there be any improvement in the educational facilities within the districts.

DISCUSSION

We are satisfied that the State Board acted wisely in this case. The community characteristics are the same in all three municipalities. These areas may not be considered prosperous in comparison with other sections of the County. The community is industrial and most heads of households work in the mills. Their incomes are modest, and in many cases, due probably to unemployment, inadequate for the support of a family. The unit has now a fairly high market value per A.D.M. (i.e. average daily membership in the school system). This will increase if U.S. Steel builds another plant, and the testimony indicates this will be done.

In coping with the problem of public education the legislature created the Department of Public Instruction. The State Board of Education is a Board within that department. It consists of seven members who serve as the Council of Basic Education; seven members who serve as the Council of Higher Education, and three members at large. (By Act of July 23, 1969, P.L.____#74 (71 P.S. 1037) there is created a Department of Education which assumes all the functions, powers and duties of the Department of Public Instruction).

The legislature has constantly attempted to enlarge school districts. The principle that the larger the unit, the better the education appears to be well established, as is evidenced by the following quotation from the Opinion of President Judge Ervin of the Superior Court, in *State Board of Education v. Franklin Township School District*, 209 Pa. Super 410, 416:

> "For many years educators have recognized the fact that the larger the school district the more comprehensive can be the program of education offered, and attempts were made to encourage districts to consolidate or merge."

Thus, the central theme running through the legislation on the subject pertains to the enlargement of existing school districts. In fact, this appears to be the sole criterion employed by the legislature in reorganizing the districts. In arguments before us, counsel for one district (Avalon) complained that the State furnished insufficient guidelines for proposed units. The State has not set any detailed rules. It provides no specifications for buildings, teachers, cafeterias or transportation, referring to these subjects in only general terms. Apparently, it believes that if "administrative units" are enlarged, other benefits such as decreased costs per pupil, improved facilities, more efficient use of teachers, and other benefits will follow in due course of time.

We would expect that initially following a merger, the same buildings will be employed, and the children will be going to school as usual. As facilities become obsolete and as funds become available, new structures will be built. A modern school house constructed by Unit 16 will unquestionably be better than one built by any one of the three districts; and it will be available to all pupils in the Unit.

The proposed unit complies with the standards set by the State. There were 4,110 pupils therein as of the crucial time, 1967-68. The market value of property per pupil in 1966 was

ures for other units in the country. It has an area of only 2.64 square miles. The three districts are contiguous, and there are no topographical barriers which will prevent access to schools in the district.

Rankin has suggested that a unit which is composed of Rankin and Swissvale will operate more efficiently than will Unit 16 as now constituted. This, however, may be unacceptable to Swissvale. We can appreciate the difficulty which the County Board had in the first instance in preparing a plan acceptable to even a majority of pupils and parents in the County. This is evident from the series of legislative enactments hereinabove listed. Also, in the case of the *Board of Education v. Franklin Township*, 209 Pa. Super. 410, (1967),. President Judge Ervin adverts to this fact. Referring to Act No. 561 of September 12, 1961, P.L. 1283, he said (p. 417):

> "This act promptly became the subject of great public controversy, resulting in its repeal less than two years later."

The fact that reorganization is a difficult problem is further evidenced by the number of appeals filed to this Court, there being in all, 17 appeals filed involving 9 Units. In 1967, there were 100 school reorganization appeals pending before the Dauphin County Court, to which appeals from all counties were taken under the 1963 Act. Nevertheless, the Constitution places the responsibility for education on the legislature. The legislature, we find, has acted in a reasonable manner in reducing the number of school districts in the State.

Conceivably, there are other plans which may work as well, or better, than the plan adopted by the County Board and approved by the Commonwealth. It is entirely possible that a larger unit than that presently constituted in the case at bar would be better than the unit created by the State Board. At one time, the County plan contemplated that Braddock, North Braddock, East Pittsburgh, Rankin and Turtle Creek would

constitute a single unit. However, we find that Unit 16 is reasonably adapted to carry out the State's objective to improve education. We can be assured that any combination of districts which we might substitute for that established by the State would create just as much interest and opposition as did the adoption of Unit 16 by the County in the first instance.

Other arguments have been advanced by counsel for appellants herein and by counsel for appellants in other cases.

We are assured, almost uniformly by counsel for districts asserting that they are aggrieved by a merger, that the proposed plan will substantially increase the tax millage in the affected districts. This is supposition. Standards for Approval, 1968, adopted by the Department of Public Instruction negate this assumption. No. 3 reads as follows:

> "3. An administrative unit shalll be planned to offer a full program of instruction, kindergarten or grade one through twelve, and provide administrative leadership, supervision and instruction at a reasonable cost consistent with the local taxable wealth and State financial support available per pupil."

And, No. 7e is:

> "e. *Use of Existing School Buildings.* An administrative unit shall utilize existing buildings to the maximum extent practical avoiding unnecessary new construction where possible."

The objective of the Commonwealth is the advancement of education and not the increase of taxes. There are deficiencies in many of the existing districts. These are freely admitted by counsel and witnesses for the districts involved. For example, in one district there is only one foreign language course offered. The Commonwealth desires two. In another, physics and chemistry are taught in alternate years instead of every year as prescribed by the State. A merger should mean that these shortcomings may be remedied without additional cost.

It has been urged that additional buildings will increase costs and taxes up to 100%. We believe that this fear is more imagined than real. The affairs of a merged district will be in the hands of a representative board which will raise taxes in the same manner as other elected and appointed officials. They will be subject to the wishes of the people they represent. The Standards for Approval quoted above do not contemplate increased expenditures. New buildings will be necessary, but they would have been necessary in any event. It would appear that a new building for 4,000 pupils will cost less than twice as much as two new buildings each for 2,000. In the long run, the merged units should provide better education at less expense.

Accordingly, we hold that the State Board did not abuse its discretion in approving the Allegheny County plan which established Unit 16.

THE TIME ELEMENT

Act 150 proposed this schedule:

It contains no effective date and accordingly, became effective on the date of its adoption, July 8, 1968.

County plans were to be prepared within ninety days from the effective date and to be submitted to the State Board within thirty days after date of preparation. Thus, all plans were due in Harrisburg within four months, or by November 8, 1968.

Provisions are made for hearings before the State Board and by the Court.

Section 6 of the Statute provides that on July 1, 1969, all administrative units contained in plans of organization approved by the State Board shall constitute and be decreed established as school districts.

Section 7 states that the Board of Directors of each unit (or the interim operating committee), shall divide the newly established district into either three or nine regions.

Section 9 provides that "On or before the fifteenth day of February immediately preceding the date of establishment" an interim operating committee consisting of nine incumbent school directors shall be elected, three for a term expiring on the first Monday of December, 1969, three for a term expiring on the first Monday of December, 1971, and three for a term expiring on the first Monday of December, 1973.

The establishment date contemplated by the Act, July 1, 1969, has passed, as has, of course, the fifteenth day of February immediately preceding it. Because of the delay caused by litigation, the expiration date for some members of the interim operating committee, December 1, 1969, is now meaningless.

It would not be feasible to set July 1, 1970, as the date on which units shall be considered established. We will, therefore, advance the dates set in the Statute by two years. This means that the interim operating committee will meet on or before the fifteenth day of February, 1971, and will then elect directors for terms expiring on or before the first Mondays of December, 1971, December, 1973, and December, 1975.

ORDER OF COURT

NOW, June 1, 1970, on consideration of Appeal of the School District of the Borough of Rankin from Adjudication of State Board of Education approving the formation of Unit 16, testimony taken and arguments made, it is,

ORDERED AND DECREED that said Appeal be and it is here dismissed. The reorganization of school districts shall proceed on the terms stated in the foregoing opinion, and according to the applicable statutes of Pennsylvania.

By this Court
McKenna, *J.*

Eo die, exception noted and bill sealed.

Frank McKenna
Judge

Opposition

1

Nos. 81-2015, 81-2030, 81-2022, 81-2034, 81-2037, 81-2038

Supreme Court, U.S.
FILED
JUL 9 1982
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

FORMER CHURCHILL AREA SCHOOL DISTRICT, et al., *Petitioners,*

v.

DOROTHY HOOTS, et al.

FORMER EDGEWOOD SCHOOL DISTRICT, et al.,
FORMER TURTLE CREEK SCHOOL DISTRICT, et al., *Petitioners,*

v.

DOROTHY HOOTS, et al.

EDWARD X. HALLENBERG, etc., *Petitioners,*

v.

DOROTHY HOOTS, et al.

ALLEGHENY COUNTY SCHOOL BOARD, et al., *Petitioners,*

v.

DOROTHY HOOTS, et al.

FORMER SWISSVALE AREA SCHOOL DISTRICT, *Petitioners,*

v.

DOROTHY HOOTS, et al.

COMMONWEALTH OF PENNSYLVANIA, et al., *Petitioners,*

v.

DOROTHY HOOTS, et al.

ON APPEAL FROM THE UNITED STATES COURT
OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

THOMAS J. HENDERSON*
1312 E. Carson St.
Pittsburgh, Pa. 15203
(412) 431-7255

* *Counsel of Record*

JACK GREENBERG
JAMES M. NABRIT, III
BILL LANN LEE
JAMES S. LIEBMAN
Suite 2030
10 Columbus Circle
New York, New York 10019
(212) 586-8397

Attorneys for Respondents Dorothy Hoots, et al.

QUESTIONS PRESENTED

1. Whether factfindings of the two courts below that state officials drew boundary lines with the intent to create separate racially segregated school districts -- findings based on an extensive evidentiary record developed during eleven years of litigation -- are clearly erroneous?

2. Whether the lower courts abused their discretion in ordering the consolidation into a single desegregated district of five small, contiguous and segregated school districts, when: (i) each of the five former districts was found, a decade before, to have been unconstitutionally created and isolated from the others by state, county and local officials; (ii) the responsibile officials failed, over the course of eight years, to present any

adequate alternative desegregation plan to cure the constitutional violation; and (iii) both courts below found that a five-district consolidation would indisputedly provide students with a more comprehensive and efficient -- as well as a desegregated -- educational program?

3. Whether the courts below abused their discretion by initially not forcing the former school districts to join as defendants, against their wills, when the districts were at all times provided a meaningful opportunity to participate in the proceedings, and in fact did participate in the proceedings by presenting evidence, without limitation, on both liability and relief?

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Nos. 81-2015, 81-2030, 81-2032,
81-2034, 81-2037, 81-2038

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

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FORMER CHURCHILL AREA SCHOOL DISTRICT, et al.

Petitioners,

v.

DOROTHY HOOTS, et al.

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FORMER EDGEWOOD SCHOOL DISTRICT, et al.,
FORMER TURTLE CREEK SCHOOL DISTRICT, et al.,

Petitioners,

v.

DOROTHY HOOTS, et al.

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EDWARD X. HALLENBERG, etc.,

Petitioners,

v.

DOROTHY HOOTS, et al.

==========

ALLEGHENY COUNTY SCHOOL DISTRICT, et al.,

Petitioners,

v.

DOROTHY HOOTS, et al.

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FORMER SWISSVALE AREA SCHOOL DISTRICT,

Petitioners,

v.

DOROTHY HOOTS, et al.

==========

COMMONWEALTH OF PENNSYLVANIA, et al.,

Petitioners,

v.

DOROTHY HOOTS, et al.

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On Appeal From the United States Court
Of Appeals For The Third Circuit

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BRIEF IN OPPOSITION

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Statement[1/]

The various petitioners are asking this Court to review the ninth reported decision in a longstanding litigation.[2/]

1/ Citations are to the Appendix to the Petition filed by the Commonwealth of Pennsylvania, No. 81-2038 (hereinafter "A.") and portions of the Record on Appeal set forth in the Joint Appendix in the court of appeals (hereinafter "R.").

2/ Hoots v. Commonwealth of Pennsylvania, 672 F.2d 1107 (3d Cir. 1982) ("Hoots IX"), A. 86a-87a n.1. The other decisions are: Hoots v. Commonwealth of Pennsylvania, 334 F. Supp. 820 (W.D. Pa. 1972) ("Hoots I"); Hoots v. Commonwealth of Pennsylvania, 359 F. Supp. 807 (W.D. Pa. 1973) ("Hoots II"); Hoots v. Commonwealth of Pennsylvania, 495 F.2d 1095 (3d Cir.), cert. denied, 419 U.S. 884 (1974)("Hoots III"); Hoots v. Commonwealth of Pennsylvania, 587 F.2d 1340 (3d Cir. 1978) ("Hoots IV"); Hoots v. Commonwealth of Pennsylvania, 639 F.2d 972 (3d Cir.), cert. denied, 101 S.Ct. 3113 (1981) ("Hoots V"); Hoots v. Commonwealth of Pennsylvania, 510 F. Supp. 615 (W.D. Pa. 1981) ("Hoots VI"); Hoots v. Commonwealth of Pennsylvania, No. 71-538 (W.D. Pa. April 16, 1981) ("Hoots VII"); Hoots v. Commonwealth of Pennsylvania, No. 71-538 (W.D. Pa. April 28, 1981) ("Hoots VIII").

(footnote continued on next page)

Plaintiffs are a class of black and white parents of school-aged children living in the former General Braddock Area School District (hereinafter "General Braddock"). Prior to 1981, General Braddock was a predominately (63%) black school district, which, together with the surrounding former all- or nearly all-white districts of Churchill (99.2% white), Edgewood (97.8% white), Turtle Creek (98.1% white), and Swissvale (83.7% white), was created by state and county officials during Pennslyvania's statutorily mandated

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2/ continued

In addition, the court of appeals denied plaintiffs' applications for writs of mandamus on two occasions. Hoots v. Weber, No. 79-1474 (3d Cir. May 2, 1979); Hoots v. Weber, No. 80-2124 (3d Cir. Sept. 9, 1980).

school district reorganizations of the 1960's.[3/]

3/ General Braddock was created in the 1960's by combining the only preexisting majority-black municipal school districts in the area, Braddock (72% black) and Rankin (51% black), with North Braddock (16% black). Hoots II, A. 17a, 20a-21a (1970 figures). In its first year of operation, 1971, General Braddock was 44.5% black. By 1980-81, the last year of its existence, General Braddock's black pupil population had increased to 63%. Id., A. 77a. After the reorganization process was complete, no other district in the violation area -- i.e., the area consistently referred to in the opinions below as "central eastern Allegheny County" -- had a black pupil population approaching General Braddock's.

"Central eastern Allegheny County" was defined by the district court in 1973 as the area lying

> east of the City of Pittsburgh and north of the Monogahela River, [in which] the County and State Boards established [General Braddock]; the School Districts of Turtle Creek, Swissvale Area, Churchill Area and East Allegheny which border on [General Braddock]; and the Edgewood School District which is situated within approximately one mile of [General Braddock]. Id., A. 12a-13a. See also, id., A. 13a-14a, 20a-22a,

Plaintiffs commenced this action on June 9, 1971. The complaint alleged that the Pennsylvania State Board of Education and Allegheny County School Board (now the Allegheny Intermediate Unit) (hereinafter, "the state and county boards") deliberately created General Braddock, Churchill, Edgewood, Swissvale and Turtle Creek as separate racially segregated school districts during three statutorily mandated school district reorganizations in the 1960's.[4/] Specifically, the complaint al-

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3/ continued

27a, 40a; Hoots III, 43a; Hoots IV, supra, 587 F.2d at 1343-44; Hoots VI, 51a-53a, 55a, 62a-63a; Hoots VIII, 73a, 76a-79a, 80a; Hoots IX, 90a-92a, 100a-101a, 105a, 108a-109a, 112a.

4/ See Act of September 12, 1961, P.L. 1283, No. 561, 24 P.S. § 2-281, et. seq. (Act 561); Act of August 8, 1963, P.L. 564, No. 299, 24 P.S. § 2-290, et. seq. (Act 299); Act of July 8, 1968, P.L. 299, No. 150, 24 P.S. § 2400-1 (Act 150).

leged that the state and county boards, in exercising their power to reorganize school districts, had "compelled the formation of school districts which concentrate and contain blacks in one school district and whites in the other school districts so as to create racially identifiable school districts ... not only to segregate [General Braddock] but the adjoining [districts] as well." The complaint requested that school district boundaries in the affected area be "alter[ed] and revise[d]" to establish a desegregated system of schools. R. 35a, 37a. Churchill, Edgewood, Swissvale and Turtle Creek were specifically named as the "adjoining," or "surrounding," school districts. Id.[5/] The complaint named as

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5/ Petitioners have stated that the complaint (i) made no allegation that each of these districts was racially segregated

defendants the Commonwealth of Pennsylvania, the state and county boards and certain of their officers. It alleged that defendants unconstitutionally created General

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5/ continued

(Churchill Petition, No. 81-2015, p. 6); (ii) requested no alteration of these school districts' boundaries (Edgewood/Turtle Creek Petition, No. 81-2030, pp. 3, 14-15); and (iii) provided no notice of the requested alteration of these school district boundaries (Churchill Petition, No. 81-2015, p. 24; Edgewood/Turtle Creek Petition, No. 81-2030, pp. 14-15 & n.10). Each of these statements is erroneous.

The amended complaint described General Braddock and each of the former white districts, R. 27a-29a, and clearly identified all five districts as "segregated" and "racially identifiable school districts" created in order to segregate black students in General Braddock and white students in Churchill, Edgewood, Swissvale and Turtle Creek, R. 30a-35a. See R. 20a-37a. Plaintiffs accordingly requested injunctive relief "altering and revising or ordering defendants to alter and revise the school reorganization plans ..." and to "adopt immediately plans that will create racially ... balanced school systems to serve the residents of [General Braddock] and the surrounding communities." R. 37a, 22a.

Braddock and the surrounding former white districts pursuant to power conferred on them by the reorganization statutes[6/] -- specifically, their power to prepare, review, amend, approve, and effectuate reorganization plans, including those which created General Braddock and the surrounding districts. R. 21a, 26a-29a, 31a.

In December 1971, the district court denied defendants' motions to dismiss. The court held that plaintiffs' allegations that, "[i]n preparing and adopting the school reorganization plans, the defendants intentionally and knowingly created ra-

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6/ See Chartiers Valley Joint School v. County Board, 418 Pa. 520, 211 A.2d 487, 491-495 (1965) (the reorganization acts delegated legislative power to define the geographic boundaries of school districts to the state and county boards); State Board of Education v. Franklin Township School District, 209 Pa. Super. 410, 228 A.2d 221, 223-24 (1967).

cially segregated school districts" stated a cause of action under the Fourteenth Amendment. Hoots I, A. 1a-2a. At the same time, the court declined to join General Braddock and the former white districts as defendants against their wills, Hoots I, A. 5a, but held that it would permit the districts to "intervene in this action under Fed. R. Civ. P. 24 if they so desire." Id. Although the court "instructed the [Commonwealth] to give notice" of the action to all five former districts, and the Attorney General of Pennsylvania thereupon directed written and later telegraphic notices to the five districts (with copies of the amended complaint attached) "urg[ing each] to intervene in this action immediately," the districts informed the court that they were "deliberately not intervening in this case" and "had no interest in being" a

party to the trial.[7] As Churchill states in its petition, the districts' failure to participate in the initial violation trial was a considered strategic decision to stay out of the litigation as long as possible.[8]

Following trial,[9] on May 15, 1973, the

7/ R. 56a-61a, 614a-18a, 272a, 3338a, 3389a. See Hoots II, A. 33a-35a; Hoots III, A. 45a-46a.

8/ Churchill Petition, No. 80-2015, p. 23. In its petition, Churchill quotes part of the following explanation of the districts' actions as summarized at a 1973 hearing by counsel for the Commonwealth:

> There is no doubt that prudent lawyering dictates what the school districts are presently doing. Were I to be in that situation, I think I would do the exact same thing. I would sit back and wait hopefully ... that the Court's opinion ... would be to their favor ... and, if not, at the later date, to seek some way to attack it .... R. 316a.

9/ At trial, plaintiffs introduced the testimony of lay witnesses, local school authorities, state officers and expert witnesses. In addition, 63 documentary, summary and graphic exhibits were introduced pursuant to stipulation. R. 55a-748a.

district court found that the state and county boards' intentionally segregative creation of General Braddock as a predominantly black district, and of Churchill, Edgewood, Swissvale and Turtle Creek as virtually all-white districts, "constituted an act of de jure discrimination in violation of the Fourteenth Amendment." The court concluded that "a violation of the Fourteenth Amendment ha[d] occurred" because "public school authorities ... made educational policy decisions which were based wholly or in part on considerations of the race of the students and which contributed to increasing racial segregation in the public schools." Hoots II, A. 37a, 35a.

The court ordered defendants to "prepare and submit to this Court within 45 days ... a comprehensive plan of school desegregation for the central eastern area

of Allegheny County [that would] remedy the constitutional violations found by this Court" by "alter[ing] the boundary lines of General Braddock ... and, as appropriate, of adjacent and/or nearby school districts." Hoots II, A. 40a.

None of the defendants appealed. After the May 1973 opinion was issued, however, Churchill and Turtle Creek reversed their pretrial opposition to intervention, and attempted to intervene, asking the court to set aside its May 1973 opinion. The district court denied the motions as "untimely" insofar as they sought retroactive intervention but granted prospective intervention, R. 966a, and the court of appeals affirmed. Hoots III, A. 44a-46a.[10/]

10/ Churchill and Turtle Creek filed a writ of certiorari, R. 2577a, which was denied. Churchill Area School District v. Hoots, 419 U.S. 884 (1974).

(footnote continued on next page)

Defendants filed no "comprehensive plan of desegregation" within 45 days. Indeed, no remedy was forthcoming for the next eight years, despite lengthy hearings conducted by the district court and (on remand from the district court) by the state board. During the 1973-1981 period, the district court not only heard evidence and argument on remedy, but also, as the court of appeals found, Hoots IX, A. 102a, specifically permitted all of the petitioner districts to reopen and present additional evidence on the violation

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10/ continued

Contemporaneously, the former white districts initiated several extended state court proceedings seeking to prevent the state defendants from proposing and submitting remedial plans to the federal district court in the instant litigation. R. 2504a, 2730a-31a.

issue.[11/] E.g., R. 1486a-1506a, 2684a-2766a, 2829a-3015a, see Hoots IX, A. 101a-02a. On each such occasion, the district court reaffirmed its 1973 finding of intentional segregation. R. 1031a-32a (May 1975), 2761a-62a (October 1975), 841a (November 1977), 3201a-02a (October 1980); Hoots VI, A. 49a, 59a (March 1981); Hoots VIII, A. 77a (April 1981). See Hoots IX, A. 101a-102a.

11/ Swissvale and Churchill formally intervened and participated fully in all of the proceedings in this case from October 1973 to the present. Other school districts, including Edgewood and Turtle Creek, in the district court's words, actually "participated," but "did not [formally] intervene because they wished to protect their position on the record...." R. 1031a. See n.8, supra and accompanying text. General Braddock voluntarily intervened in February 1979, R. 2588a, and the court mandatorily joined Edgewood and Turtle Creek in May 1979. R. 853a.

During the 1973-1975 period, the district court thrice remanded the case to the state board for remedial hearings, the

The district court heard and considered extensive evidence on three plans submitted by the State and various plans submitted by the districts -- including Plans 22W, A, B, Z, the Tuition Plan, the Upgrade Plan, and variations of these plans.[12/]

During the course of the 1973-1981 proceedings in the district court and the

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11/ continued

transcripts of which were made part of the record by the district court. See R. 1128a-29a, 3194a-95a. All the petitioner school districts participated actively in the state board hearings. E.g., 9/10/73 St. Bd. Tr.; 3/6/75 St. Bd. Tr.

12/ All six of the plans proposed by petitioners (notably, by the Commonwealth, Churchill, Swissvale, and Turtle Creek) were interdistrict in nature, and all but one of those plans included the five former districts presently before this Court. Similarly, all but one of petitioners' plans involved the consolidation of existing districts into larger units. Hoots IX, A. 93a.

court of appeals, General Braddock became a majority, and then a two-thirds, black district. Finally, in 1981, the court of appeals directed the district court to complete "scope of the violation" and remedial proceedings within three months, and to enter a final order granting appropriate relief beginning with the 1981-1982 school year. Hoots V, supra, 639 F.2d at 980-91. This Court denied certiorari. Swissvale Area School District v. Hoots, 101 S.Ct. 3113 (1981).

On remand, the district court reconsidered the evidence on violation adduced not only at the initial liability trial in 1972, but also at the numerous subsequent hearings held between 1973 and 1981. Hoots VI, A. 50a-56a. Based on that evidence, the court reaffirmed that "racially discriminat[ory] acts of the state ha[d] been

a substantial cause of interdistrict segregation," and concluded "that a multi-district remedy" involving some or all of seven districts (including General Braddock and the four petitioner districts) was "appropriate" to cure the segregative effects of the unconstitutional "redrawing of [those] school district boundaries in that [central eastern] part of Allegheny County." Hoots VI, A. 50a-56a.[13/]

Turning to the question of remedy, the district court rejected the plans submitted by the state and the petitioner districts,

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13/ Specifically, the court reaffirmed that "[t]he State and County Boards violated the Constitution in the manner in which the[se] school district lines were drawn." Hoots VI, A. 58a. The court expressly implicated all of the former districts in this conclusion. Id., A. 62a; see Hoots VII, A. 79a; Hoots IX, A. 111a. The court further found that public school and municipal officials in what became the petitioner districts were not "innocent" in the decade-long reorganization process

finding all of them incapable of achieving any effective desegregation. Based on all "of the hearings held," the court concluded that "only a single district formed from the consolidation" of school districts whose lines had been drawn as a part of the violation would solve the "many difficulties" identified in past hearings on prior plans. Hoots VII, R. 65a-66a. See Hoots VIII, A. 71a-72.

Hearings were scheduled to determine which districts were "to be consolidated for the purpose of remedying the constitutional violations found." Hoots VII, A. 67a. See Hoots VIII, A. 72a-73a. Plain-

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13/ continued

during which those districts' boundaries were drawn or redrawn," but rather that the desire of those officials to avoid including their communities in a school district with black students caused the "elimination [of General Braddock] from consideration for merger with those districts." Id., A. 59a-60a.

tiffs presented expert testimony recommending a consolidation of the Churchill, Edgewood, General Braddock, Swissvale and Turtle Creek districts. General Braddock supported plaintiffs' position. Hoots VIII, A. 73a. The other districts opposed their inclusion in plaintiffs' plan, but presented no evidence designed to establish that they were not involved in, or affected by, the underlying constitutional violation.

On April 28, 1981 -- nearly eight years after the original finding of a constitutional violation -- the district court for the first time ordered that defendants take specific, affirmative steps to remedy that violation. Reaffirming once again its finding that the "intentional creation [of General Braddock] as a racially identifiable black district constituted the constitutional violation in this case," the court ordered the consolidation of five of the

districts "involve[d] in the violations" into a single district. The court found "that a [n]ew [s]chool [d]istrict composed of the [former] school districts of Churchill, Edgewood, Swissvale, General Braddock, and Turtle Creek would achieve desegregation ... and would achieve the highest beneficial results over and above the results of any other plan submitted to this Court by any party during the whole period of this litigation." Hoots VIII, A. 73a, 77a, 79a.

On February 1, 1982, the court of appeals unanimously concluded that the district court's finding of intentional discrimination was supported by substantial evidence and was not clearly erroneous, and that the consolidation remedy was well within the court's equitable discretion. Hoots IX, A. 86a.

The court determined that the finding of a constitutional violation "was fully supported by the record," which contained "specific pieces of direct evidence of segregative intent" as well as "circumstantial or 'objective' evidence." Hoots IX, A. 108a-09a. Relying on contemporaneous documents and testimony from both the 1972 violation trial and from the many subsequent proceedings, the court found a substantial body of evidence demonstrating that the state and county boards intentionally segregated General Braddock and the former white districts in order "to satisfy" public officials and residents of neighboring white communities, who admitted opposing inclusion in a district with General Braddock expressly because of "the black issue," "the non-white population ... factor," the "black-white factor," and the desire to shield white children from

"colored people [of] the kind that live in North Braddock, Braddock and Rankin!" Hoots IX, A. 105a-08a.

In addition, the court found that the intentional-discrimination finding was undergirded by substantial objective evidence, including: the boards' violation of almost all the applicable statutory and administrative reorganization standards, (such as the criteria requiring a 4000-person minimum student population in each district, the use of existing facilities, racial and cultural diversity, and comprehensive educational program); the severe and maximally segregative impact of the line drawing; the foreseeability -- indeed, the responsible officials' admitted awareness -- of that segregative result and of the certain financial insolvency of the one black district they created; and the absence of any legitimate purpose or

valid state interest in the reorganization plans adopted. Hoots IX, A. 108a.

Likewise, the court of appeals found that "the district court did not abuse its discretion" in ordering a multi-district consolidation, since the line-drawing violation was "itself ... interdistrict in nature" and was properly "located and defined" by the district court, and since the remedy was "tailored ... to fit the actual showing of de jure discrimination by all of the districts involved" and was "supported by more than enough evidence." Hoots IX, A. 111a-13a, 121a-22a (emphasis in original).

As of July 1, 1981, the former districts ceased to exist as legal entities, and the Woodland Hills School District (hereinafter "Woodland Hills"), composed of all the former districts, began to function as a single desegregated school district.

Presently in its second year of operation under a locally elected board of school directors, Woodland Hills has a student population of approximately 8,000, 81.3% white and 18.7% black. It has graduated students, adopted budgets, incurred debts and obligations, levied and collected taxes, and engaged in long range development and planning for further desegregation and other educational programs.

REASONS TO DENY THE WRIT

Respondents Dorothy Hoots, et al., respectfully submit that the petitions for certiorari should be denied for the reasons that follow.

Initially, we note that none of the six petitions asserts that the decision below conflicts in any way with the decision of any other court of appeals on any of the numerous questions presented.

Nor is any substantial federal question presented. As we demonstrate below, petitioners merely seek "certiorari to review evidence and discuss specific facts." United States v. Johnston, 268 U.S. 220, 227 (1925). Indeed, this is the eighth time over the last nine years that petitioners have asked a federal appellate court "to review [the same] evidence and dicusss [the same] specific facts." Id.[14/]

1. Findings of Intentional Segregation

Five of the six petitions argue that

14/ See Swissvale Area School District v. Weber, No. 73-1849 (3d Cir. Oct. 12, 1973); Hoots v. Commonwealth of Pennsylvania (Hoots III), 495 F.2d 1095 (3d Cir. 1974); Churchill Area School District v. Hoots, 419 U.S. 884 (1974); Hoots v. Commonwealth of Pennsylvania (Hoots IV), 587 F.2d 1340 (3d Cir. 1978); Hoots v. Commonwealth of Pennsylvania (Hoots V), 639 F.2d 972 (3d Cir. 1981); Swissvale Area School District v. Hoots, 101 S.Ct. 3113 (1981); Hoots v. Commonwealth of Pennsylvania (Hoots IX), 672 F.2d 1107 (3d Cir. 1982).

no findings of fact of purposeful segregation were made and affirmed by the courts below and, in the alternative, that the findings of intentional segregation made and affirmed below are supported by insufficient evidence. E.g., Churchill Petition, No. 81-2015, pp. 6, 11-13. The sixth petition concedes and does not challenge that: "The court of appeals, in affirming the trial court's judgments, held that the trial court had made the required findings of segregative intent and that these findings were not clearly erroneous." Swissvale Petition, No. 81-2037, p. 11 (emphasis in emphasis).

In point of fact, precisely the same arguments on sufficiency of the findings and evidence have been considered and rejected by both courts below. Hoots IX, A. 96a-103a; 49a-63a. Indeed, this Court

itself has previously refused to review the same claims. See Churchill Area School District v. Hoots, No. 73-2039, cert. denied, 419 U.S. 884 (1974), R. 2577a.

With respect to the absence of appropriate findings, the court of appeals reviewed the record and concluded that de jure segregation was expressly alleged by the plaintiffs and repeatedly found by the district court. Thus, in denying the motion to dismiss in 1971, the district court held plaintiffs' complaint to allege that "defendants intentionally and knowingly created racially segregated school districts." Hoots I, A. 1a. And, in ruling favorably on that complaint in 1973, the district court found that state officials made "educational policy decisions which were based wholly or in part on considerations of the race of the

students." Hoots IX, A. 99a.

The court of appeals then analyzed the preliminary factual determinations of the district court that supported its final intentional-discrimination determination in 1973 (as reiterated and reaffirmed on several occasions between 1975 and 1981).[15/] The court of appeals concluded that appropriate findings had been made concerning

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15/ In March 1981, the district court undertook a careful and extensive "review [of] the facts of this case to determine whether an interdistrict remedy is appropriate." Hoots VI, A. 49a. The court reviewed both the original 1973 liability record and subsequent evidence on violation, much of it presented by the petitioner former districts, id. A. 56a, and concluded that: the reorganization plan was devised by state officials to satisfy the wishes of surrounding municipalities not to be placed in a district with black students; the districting was not rationally related to any legitimate purpose; the boundaries promote no valid state interest; and public officials in the districts created by the reorganization plan were not "innocent," but rather were themselves guilty of injecting racial animus into the reorganization process. Id. A. 54a-55a, 59a.

the racial motives of the state and county officials who created the five former districts, as well as the foreseeably and advertently segregative consequences of those line-drawing decisions, and the absence of any valid state interest served by those lines. Hoots IX, 100a-02a.

Similarly, the claim that there was insufficient evidence to support the intentional-segregation findings of the two courts below is without foundation. As the court of appeals concluded, "the district court's constitutional violation finding was not clearly erroneous and, indeed, was fully supported by the record." Hoots IX, A. 109a; see id.; A. 103a-09a; Hoots VI, 50a-62a.

Moreover, the categories of proof relied upon by the courts below comport fully with the evidentiary standards established by this Court for determining

the existence of intentional segregation in school desegregation cases. First, as directed by this Court's prior decisions, the courts below relied on various "specific pieces of direct evidence of segregative intent or purpose" (see pp. 21-22, supra). Hoots IX, A. 108a.[16/] That evidence convincingly established that state and county officials intentionally created General Braddock as a predominantly black school district in order to accommodate the racial antagonism of officials and parents in the surrounding white districts and

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16/ See Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 260, 267 (1977), citing with approval Reitman v. Mulkey, 387 U.S. 369, 373-76 (1967) and Davis v. Schnell, 81 F. Supp. 872, 875, 880-81 (S.D. Ala.), aff'd, 336 U.S. 933 (1949). See also United States v. School Commissioners, 573 F.2d 400, 405-08 (7th Cir.), cert. denied, 439 U.S. 824, on remand, 456 F. Supp. 183, 187-89 (1978); United States v. Missouri, 363 F. Supp. 739, 745-46 (E.D. Mo. 1973), aff'd, 515 F.2d 1365, 1367 (8th Cir.), cert. denied, 423 U.S. 951 (1975).

communities, who did not want their children to attend school with blacks. Thus, unlike this Court's recent decision in Rogers v. Lodge, ___ U.S. ___, No. 80-2100 (July 1, 1982), in which the Court held that "discriminatory intent need not be proved by direct evidence," slip op. at 5 (majority opinion), both courts here relied primarily on "direct, reliable, and unambiguous indices of discriminatory intent," slip op. at 4 (Powell, J., dissenting) (emphasis in original).

Second, the courts also "relied on circumstantial or 'objective' evidence." Hoots IX, A. 108a. Such evidence included (i) the repeated rejection by state and county officials, over a period of several years, of desegregative reorganization proposals and the substitution of boundary lines that conformed to "the desires of as

many of the surrounding municipalities as possible to be placed in a school district which did not include" blacks, Hoots II, A. 32a; Hoots VI, A. 55a; Hoots IX, A. 108a;[17] (ii) those officials' thoroughgoing "disregard [for] statutory and administrative reorganization standards, e.g., the statutory 4,000 pupil minimum guideline, the requirement that existing facilities be used where possible, ... and the requirement that each district be capable of providing a comprehensive educational program," Hoots IX, A. 108a; Hoots VI, A. 54a; Hoots II, A. 28a-30a;[18] (iii)

17/ See Village of Arlington Heights, supra, 429 U.S. at 264-65 ("historical background of the decision is one evidentiary source" of intentional segregation and the "specific sequence of events leading up to the challenged decision also may shed some light on the decisionmaker's purposes").

18/ See Village of Arlington Heights, supra, 429 U.S. at 267 ("substantive de-

those officials' consistent rejection of desegregative redistricting plans (which would have complied with the reorganization standards) in favor of alternatives that maximized racial segregation, Hoots IX, A. 108a; Hoots VI, A. 54a-55a; Hoots II, A. 21a-22a, 27a-28a, 31a-32a;[19/] (iv) the knowing, indeed admittedly advertent, creation by state and county officials of racially segregated school districts, Hoots IX, A. 106a, 108a; Hoots VI, A. 54a; Hoots

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18/ continued

partures [from applicable standards] may be relevant, particularly if the factors usually considered important by the desicionmaker strongly favor a decision contrary to the one reached").

19/ See Village of Arlington Heights, supra, 429 U.S. at 264; Gomillion v. Lightfoot, 364 U.S. 339 (1960); United States v. Board of School Commissioners, supra, 573 F.2d at 413.

II, A. 26a-27a;[20] (v) the foreseeability of the reorganization plan's harmfully segregative consequences, Hoots IX, A. 108a; Hoots VI, A. 53a; Hoots II, A. 26a-28a, 31a;[21] and (vi) the fact that no other combination of school districts in the central eastern area would have as successfully isolated black students in one district (General Braddock) and white students in the surrounding districts.

20/ See Columbus Board of Education v. Penick, 443 U.S. 449, 465 (1979) ("Adherence to a particular policy or practice with full knowledge of the predictable effects of such adherence upon racial imbalance in a school system is one factor among many others which may be considered by a court in determining whether an inference of segregative intent should be drawn").

21/ See Dayton Board of Education v. Brinkman, 443 U.S. 526, 536 n.9 (1979) ("proof of foreseeable consequences is one type of quite relevant evidence of racially discriminatory purpose"); Personnel Administrator v. Feeney, 442 U.S. 256, 279 n.25 (1979); United States v. Board of School Commissioners, supra, 573 F.2d at 413.

Hoots III, A. 22a-25a; Hoots IX, 108a.[22/]

Petitioners, therefore, are plainly wrong that evidence of purposeful segregation was lacking.[23/] As the court of appeals concluded, the findings of fact that the district court originally made in 1973 and that it supplemented in March 1981 are not "clearly erroneous." Rule 52(a), Fed. R. Civ. Pro.; see United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948). The findings of a trial judge who

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22/ See Rogers v. Lodge, supra, slip. op. at 5 (majority opinion); Washington v. Davis, 426 U.S. 229, 242 (1976) ("it is ... not infrequently true that the discriminatory impact ... may for all practical purposes demonstrate unconstitutionality").

23/ Their claim, in any event, rests on no more than inaccurately selective references to individual aspects of the comprehensive findings and evidence below. E.g., Churchill Petition, No. 81-2015, p. 11 (only finding or evidence discussed concerns racial disparity); Commonwealth of Pennsylvania Petition, No. 81-2038, pp. 11-12 (only findings or evidence discussed concerns racial disparity and foreseeability).

had a full opportunity to examine the credibility of the witnesses over the course of eleven years are entitled to substantial deference, as, indeed, are the conclusions of a court of appeals that has gained familiarity with the litigation in the course of reviewing various matters on six occasions over the last nine years. See notes 2, 14, supra.

Such "deference" is especially appropriate because of the trial court's "proximity to local [school] conditions," Brown v. Board of Education, 349 U.S. 294, 299 (1955), and because the issue of "whether ... differential impact of [a practice] resulted from an intent to discriminate on racial grounds 'is a pure question of fact, subject to Rule 52's clearly erroneous standard.'" Rogers v. Lodge, supra, ___ U.S. ___, slip. op. at 9-10 (majority opinion), quoting Pullman-Standard v.

Swint, ___ U.S. ___, 50 U.S.L.W. 4425, 4429 (April 27, 1982); Dayton Board of Education v. Brinkman, 443 U.S. 526, 534 (1979); Commissioner v. Duberstein, 363 U.S. 278, 286 (1960); United States v. Yellow Cab Co., 338 U.S. 338, 341 (1949).

Moreover, "[t]he Court of Appeals did not hold any of the District Court's findings of fact to be clearly erroneous, and this Court has frequently noted its reluctance to disturb findings of fact concurred in by two lower courts. See, e.g., Berenyi v. Information Director, 385 U.S. 630, 635 (1967); Blau v. Lehman, 368 U.S. 403 (1962); Graver Mfg. Co. v. Linde Co., 336 U.S. 271, 275 (1979)," Rodgers v. Lodge, supra, ___ U.S. ___, slip. op. at 10 (majority opinion); cf. Columbus Board of Education v. Penick, 443 U.S. 449, 468 (Burger, C.J., concurring); id. at 470-79 (1979) (Stewart, J., concurring).

Nor are novel or significant legal issues presented. As indicated above, the evidentiary sources utilized by the lower courts conform perfectly to the Court's directives on the proper method of proving intentional segregation. See nn. 16-22, supra, and accompanying text. The courts below did no more than conscientiously apply the well-established and noncontroversial requirements of Milliken v. Bradley, 418 U.S. 617 (1974), to the facts at hand.[24/] This, accordingly, is not a case in which the finding of a

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24/ Accord, Evans v. Buchanan, 582 F.2d 750 (3d Cir. 1978)(en banc), cert. denied, 446 U.S. 923 (1980); 555 F.2d 373 (3d Cir. 1977)(en banc), cert. denied, 434 U.S. 934 (1978); 393 F. Supp. 428 (D. Del.), (3-judge court), aff'd, 423 U.S. 963 (1975); Morrilton School District v. United States, 606 F.2d 222 (8th Cir. 1979), cert. denied, 444 U.S. 1071 (1980). United States v. Board of Commissioners, supra; United States v. Missouri, 515 F.2d 1365 (8th Cir.), cert. denied, 423 U.S. 951 (1975).

constitutional violation presses the limits of any doctrine of liability. Rather, the key violation found, the "[g]errymandering of boundary lines," Columbus Board of Education v. Penick, supra, 443 U.S. at 462 n.10, is a classic example in the school context of intentionally segregative state action.

Moreover, the record on violation is unequivocal. For example, the chairman of the state board of education admitted under oath that, had reorganization criteria been properly applied and had racial factors not been improperly considered, the board "wouldn't have done it" -- e.g., would not have created General Braddock and insulated its predominantly white neighbors. R. 2702a-03a (T. Christman). Moreover, another state official testified that, had reorganization criteria, rather than racial biases, been followed in the reorganization

process, none of the districts in central eastern Allegheny County would have been created as racially segregated units. R. 254a, 260a (T. Anliot).[25/]

25/ While conceding that the district court applied proper standards and relied on sufficient evidence in finding a constitutional violation and that the two courts below found that all of the petitioner districts' boundaries were drawn as a result of their racially motivated efforts to avoid a merger with any black districts, Swissvale nevertheless argues that the matter should be remanded to provide yet another opportunity for the districts to present evidence that they would have been created as they were regardless of the constitutional violation. Swissvale Petition No. 81-2037, at pp. 11, 18-19. This argument simply ignores substantial record evidence (including the Christman and Anliot testimony noted in text) and repeated findings establishing that: none of the petitioner districts would have been created as they were absent the constitutional violation; that those districts' boundary lines were not "rationally related to any legitimate purpose" and "did not promote any valid state interest;" and that there was no explanation apart from race that could possibly account for the configuration of districts actually created by state and county officials. Hoots IX, A. 100a; Hoots VI, A. 55a, Hoots II, A. 32a-33a.

2. The Remedy

Five of the six petitions seek certiorari to review the exercise of discretion by the courts below in ordering consolidation of General Braddock and the four surrounding white districts into one desegregated district. The Commonwealth does not oppose the remedy.[26/] Commonwealth of Pennslyvania Petition, No. 81-2038, p. 16 n.9. These identical arguments have been fully considered and rejected by both courts below, Hoots VI, A. 56a-62a; Hoots VIII, A. 79a; Hoots IX, A. 115a-16a, and this Court has previously declined to review these claims. Churchill Area School

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26/ Indeed, in September 1980, the Commonwealth informed the district court that the consolidation of these five districts was a feasible and efficacious remedy considering educational, administrative and desegregation criteria. Relying on the same criteria, the Commonwealth warned the court against a consolidation of fewer than these five districts. R. 2644a-45a.

District v. Hoots, No. 73-2038, cert. denied, 419 U.S. 889 (1974), R. 2577a.

In order to assess the district court's exercise of discretion on remedy, it is first necessary to note that fully eight years passed between the time the district court first found that state, county and local officials had committed a constitutional violation and the imposition of any remedy. Notwithstanding the patient efforts of the district court during those years, petitioners defaulted completely on their affirmative duty to provide an expeditious and adequate remedy to eliminate "root and branch"[27/] the effects of the violation found, i.e., the racially motivated drawing of segregative district boundary lines. Accordingly, it was only because of petitioners' default

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27/ Green v. County School Board, 391 U.S. 430, 439 (1968).

that the district court was forced to frame a remedy itself.[28/]

The court devised the remedy, however, only after holding numerous hearings at which expert and lay testimony and documents were received. The district court, as discussed above, reviewed the entire record on violation before considering any remedy and gave each surrounding district a full opportunity to prove that it was not affected by or guilty of any specific violational act and that it could not be involved in any remedy. See Hoots VI, A. 56a.

The district court concluded that General Braddock and each of the four petitioner districts could properly be included in an interdistrict remedy for two individually sufficient reasons. First, the district court concluded that, since "[t]he

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28/ See Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 15 (1971).

State and County Boards violated the constitution in the manner in which the school district lines were drawn ... [in] all [of the] surrounding districts," Hoots VI, A. 58a (emphasis added), "racially discriminat[ory] acts of the state have been a substantial cause of interdistrict segregation," id., A. 56a, and "the effects of [that] unconstitutional state action are felt in [all of the surrounding] districts," id., A. 57a. Accordingly, following the unanimous rule of this Court and the courts of appeals, the district court held that "[a] multidistrict remedy can be applied to surrounding districts that have not been found to have committed a constitutional violation themselves [because] their boundaries were drawn or redrawn during the course of the ... violation"

committed by other state actors. Id., A. 56a.[29/]

Second, the court reiterated that, in any event, public officials in each of the petitioner districts (or their predecessor districts) were actually at fault, because they "continually sought to avoid being included in a school district with [General Braddock] due to the high con-

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29/ Accord, Milliken v. Bradley, supra, 418 U.S. 746 (interdistrict remedy appropriate where "racially discriminatory acts of state ... officials have been a substantial cause of interdistrict segregation," particularly "where district lines have been deliberately drawn on the basis of race" by those officials; id. at 755 (Stewart, J., concurring)(interdistrict "restructuring of district lines" appropriate where "state officials had contributed to the separation of the races by drawing or redrawing school district lines"); Morrilton School District No. 32 v. United States, supra; United States v. Board of School Commissioners, supra, 573 F.2d at 410; Evans v. Buchanan, 416 F. Supp. 328 (D. Del. 1976), aff'd, 555 F.2d 373 (3d Cir. 1977)(en banc), cert. denied, 434 U.S. 934 (1978).

centration of blacks." Hoots VI, A. 59a. See also Hoots IX, A. 114a.[30/]

On appeal, the petitioner districts' claims of insufficient factfinding and evidence on their involvement in, and responsibility for, the unconstitutional reorganizations were fully briefed and again rejected. Hoots IX, A. 109a-22a. The court of appeals concluded that the evidence relied on by the district

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30/ Accord, Milliken v. Bradley, supra, 418 U.S. at 744-45 (interdistrict remedy appropriate where "racially discriminatory acts of ... local school officials have been a substantial cause of interdistrict segregation," particularly where, as a result of those acts, "district lines have been deliberately drawn on the basis of race"); Morrilton School Dist. No. 32 v. United States, supra, 606 F.2d at 226-29; Evans v. Buchanan, 582 F.2d 750, 762-67 (3d Cir. 1978); United States v. Board of School Commissioners, supra, 573 F.2d at 407-08, 410; United States v. Missouri, supra, 515 F.2d at 1369-71, aff'g 388 F. Supp. 1058, 1059-60 (E.D. Mo. 1978), and 363 F. Supp. 739, 745-46, 747-50 (E.D. Mo. 1973).

court made out an "actual showing of de jure discrimination by [and affecting] all of the districts involved" in the remedy. Hoots IX, A. 111a (emphasis in the original).[31]

31/ In view of the two-court conclusion that respondents made out an "actual showing ... [that] all of the [petitioner] districts" were (i) affected (indeed created) by the state and county boards' invidious actions, and (ii) were themselves guilty of racially motivated segregative acts, Hoots IX, A. 111a (emphasis in original), Swissvale's argument, joined by no other petitioner, that its inclusion in the remedy was solely the function of having some burden of proof allocated to it is completely misdirected. See Swissvale Petition, No. 81-2037, p. 18. The only "burden" allocated to Swissvale and the other districts was the traditional defendant's burden (more accurately, opportunity) to rebut the otherwise legally sufficient proof of intentional discrimination by and affecting each district that was introduced by plaintiffs. Like the other petitioner districts, Swissvale failed to meet that "burden" because it failed, despite numerous opportunities, to adduce any evidence tending to rebut plaintiffs' showing that Swissvale's boundaries were the product of the state's, county's and its own officials' intentionally segregative acts and decisions.

Indeed, even the court of appeals' summary review of "some of [the] evidence" relied upon by the district court squarely implicates each of the four petitioner districts in the violation -- for example, through (i) the admissions under oath of an area municipal official that he and his counterparts in the predecessor districts of Swissvale and Turtle Crrek "pressured State and County Board members in the 1960's to insulate their municipalities ... from merger with [General Braddock] because of ... the bitterness felt by 'whites' towards 'blacks' in the area;" (ii) the contemporary statements of other area officials involved in the reorganization process charging Churchill with refusing to merge with neighboring districts in 1964 for reasons of "'race'" and "'color,'" and (iii) the state and county boards' creation of the sub-1000-pupil Edgewood district in

1969, in stark contravention of the applicable guidelines' 4000-pupil minimum. Hoots IX, A. 105a, 106a-07a, 108a, quoting R. 118a-126a, 588a.

The rejection -- by both courts below, after plenary consideration -- of the claim of each of the petitioner districts that it should not be included in any remedy is entitled to substantial deference. For factual and evidentiary claims on remedy that have been rejected by two courts below are no more appropriate for further review than similar issues going to violation. See pp. 36-38, supra. Indeed, a "district court's equitable power to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies," Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 15 (1971), and because breadth is necessary "to allow the most complete achievement of the

[remedial] objectives ... attainable under the facts and circumstances of the specific case." Franks v. Bowman Transportation Co., 424 U.S. 747, 770-71 (1976).

The intimate knowledge and experience of the trier of fact -- and of the court of appeals -- with the circumstances of the case, as well as the long course of proceedings and the careful and deliberate framing of relief below even more thoroughly undermine petitioners' claim of abuse of discretion. This, after all, is a case in which the Commonwealth and petitioner districts themselves proposed various interdistrict consolidation remedies. See n.12, supra. It is hardly an abuse of discretion for the trial judge to select from among the available remedial

alternatives the remedy that long experience dictated would most effectively cure the underlying violation and provide equitable relief.

Furthermore, no petitioner disputes the express findings of the district court, Hoots VIII, A. 73a, concurred in by the court of appeals, Hoots IX, A. 116a-19a, that the consolidation of the former districts into the Woodland Hills School District is the best remedy in terms of desegregation, enhanced educational program and administrative efficiency:[32/] The consolidation results in an economically and demographically stable district, with a

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32/ In reaching this conclusion, the courts below relied on the same reorganization guidelines and criteria that should have been, but were not, followed by the state and county boards in the 1960's, including racial and cultural diversity, geographic size, contiguity, transportation, pupil population, economic efficiency and financial stability. See pp. 23, 33, supra.

racial distribution comparable to that in the neighboring areas of Allegheny County. Notwithstanding the consolidation, Woodland Hills is smaller in size than the average school district in Allegheny County. Moreover, the new district's roughly circular shape lends itself to increased administrative and transportation efficiencies -- since no point in the district lies more than 2.5 miles from the center. As a result, the preexisting transportation facilities of the merged districts are adequate to serve the transportation needs of the new district, and the merger has accordingly resulted in no increase in the number of students bused to school. Hoots v. Commonwealth, No. 71-538 (W.D. Pa. May 12, 1982).

Because of declining enrollment in all the former districts, consolidation and desegregation also promotes educational efficiency and economy. Thus, not only does the merger place the new district's student population above the 4000-person statutory minimum in Pennsylvania (previously, all five former district were below that minimum), but it also allows for the closing of old and underutilized facilities and for a better organized comprehensive educational program without additional costs. Indeed, as the courts below found, e.g., Hoots IX, A. 118a, there is the possibility of very substantial monetary savings as a result of the merger. In any event, Woodland Hills is financially viable, having a higher tax base per student than the state average. Hoots IX, A. 116a-119a, 73a-75a.

In sum, there is no reason to unravel a constitutionally mandated and effective remedy that has provided the central eastern portion of Allegheny County with equal educational opportunity for the first time since the 1960's.

3. Meaningful Opportunity to Participate

Petitioner districts also seek review of the district court's decision not to join them as defendants, against their express wishes, prior to the initial violation trial in 1973. The Commonwealth -- which failed to appeal the nonjoinder issue in 1972 or thereafter, and which itself submitted proposals for interdistrict relief that included all four petitioner districts, see n.12, supra -- now also seeks review of the nonjoinder question. Both the district court and court of appeals have rejected petitioners'

contention on numerous occasions, Hoots I, A. 4a-5a; Hoots II, A. 33a-35a; Hoots III, A. 42a; Hoots IX, A. 111a, and this Court itself has previously declined to review the matter. See Churchill Area School District v. Hoots, No. 73-2038, cert. denied, 419 U.S. 884 (1974), R. 2578a-79. In any event, it is clear that petitioner districts were not in fact denied a meaningful opportunity to participate in any stage or aspect of this litigation.

The original motions to dismiss for failure to join mandatory parties were correctly denied in 1972, under Rule 19, Fed. R. Civ. P., because Pennsylvania law does not afford local school districts any legally cognizable interest in their boundaries[33/] sufficient to make them man-

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33/ See Chartiers Valley Joint Schools v. County Board, 418 Pa. 250, 211 A.2d 487, 501 (1965).

datory parties in a suit against the state regarding those boundaries. Hoots I, A. 4a-5a; Hoots II, A. 33a-35a.[34/] The district court nevertheless went beyond the dictates of Rule 19, and directed the parties to notify the surrounding districts that their boundaries might be changed and to invite them to intervene. See Hoots II, A. 33a-35a. Indeed, the court stated in a published order that it would look favorably on intervention motions from the

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34/ Accord, Husbands v. Commonwealth of Pennsylvania, 359 F. Supp. 925, 937 (E.D. Pa. 1973)(Pennsylvania reorganization statutes deprive school districts of an interest in their boundaries sufficient to make those districts mandatory parties in a suit similar to the present one); 3A MOORE'S FEDERAL PRACTICE ¶ 19.07-1[2] & n.4, at 129-30 (citing with approval the district court's joinder ruling in Hoots II). See also Lee v. Macon County, 268 F.2d 458, 479 (M.D. Ala.)(3-judge court), aff'd, 389 U.S. 215 (1967); Griffin v. Board of Education, 239 F. Supp. 560, 566 (E.D. Va. 1965).

neighboring districts. Hoots I, A. 5a. See pp. 10-11, supra.

In short, from the very beginning, the petitioner districts had full notice of, and a meaningful opportunity to participate in, the proceedings in this case. Indeed, it is conceded by the petitioner districts that their failure to participate in the original trial was not the result of some action or inaction on respondents' or the district court's part, but instead was the result of a studied decision on their parts, dictated by considerations of so-called "prudent lawyering," to "'sand-bag' -- to gamble on [a favorable ruling] while saving [another] claim in case the gamble doesn't pay off." Engle v. Isaac, ___ U.S. ___, 71 L.Ed.2d 783, 801 n.34 (1982). See n.8, supra, and accompanying text. If the districts' interests were in

any way prejudiced, therefore, it was no one's fault but their own.

In any event, petitioner district's interest were not adversely affected by their deliberate nonparticipation at the 1972 trial, for, as the court of appeals found in its most recent discussion of this issue, Hoots IX, A. 102a, the district court actually permitted those districts, following their post-1973 intervention and joinder, to reopen the violation finding and to adduce whatever evidence they chose on the matter -- which they did. For instance, the chairman of the State Board of Education, who testified about the reorganization process in central eastern Allegheny County and admitted that his agency knowingly segregated the school districts there, see p. 40, supra, R. 2702a-03a, was expressly called in 1975 by the former districts to testify as their witness

on the issue of the existence and scope of the violation. R. 2673a, 2799a. At no time, in fact, have any of the petitioner districts identified or proffered any evidence that they were prevented from presenting on any issue relevant to this litigation.

Having had formal notice from the outset about the pendency, substance, and implications of this litigation, having been expressly invited by the district court to participate in it if they so chose, and having in fact participated fully on all issues over the course of the last nine years, see pp. 14-15 & n.11, supra, the petitioner districts have no basis in fact or law for asking this Court to review the district court's exercise of its discretion not to force them, against their wills, to participate in a single

hearing held more than nine years ago.[35/]

CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted,

THOMAS J. HENDERSON*
1312 E. Carson St.
Pittsburgh, Pa. 15203
(412) 431-7255

*Counsel of Record

35/ The claim that the surrounding districts were denied a meaningful opportunity to participate can only be made by ignoring that this case is completely unlike Milliken v. Bradley, supra, 418 U.S. at 730-31, 752, where the surrounding districts did not have formal notice of, were not invited to participate in, and in fact did not participate in, any proceedings. Milliken, moreover, did not involve either segregative redistricting by state officials, or state school-district-reorganization statutes under which local districts were expressly divested by the state legislature of any legal interest in their boundaries.

JACK GREENBERG
JAMES M. NABRIT, III
BILL LANN LEE
JAMES S. LIEBMAN
Suite 2030
10 Columbus Circle
New York, New York 10019
(212) 586-8397

Attorneys for Respondents Dorothy Hoots, et al.

Opposition

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Nos. 81-2015; 81-2030; 81-2032; 81-2034; 81-2037; 81-2038

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FILED
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ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

CHURCHILL AREA SCHOOL DISTRICT,
Petitioner in No. 81-2015,

v.

DOLOTHY HOOTS, et al., *Respondents.*

EDGEWOOD SCHOOL DISTRICT AND
TURTLE CREEK AREA SCHOOL DISTRICT,
Petitioners in No. 81-2030,

v.

DOROTHY HOOTS, et al., *Respondents.*

EDWARD X. HALLENBERG; ALLEGHENY COUNTY SCHOOL BOARD AND
ALLEGHENY INTERMEDIATE UNIT BOARD OF SCHOOL DIRECTORS,
Petitioners in Nos. 81-2032 and 81-2034,

v.

DOROTHY HOOTS, et al., *Respondents.*

SWISSVALE AREA SCHOOL DISTRICT,
Petitioner in No. 81-2037,

v.

DOROTHY HOOTS, et al., *Respondents.*

COMMONWEALTH OF PENNSYLVANIA, et al.,
Petitioners in No. 81-2038,

v.

DOROTHY HOOTS, et al., *Respondents.*

BRIEF OF RESPONDENT GENERAL BRADDOCK AREA SCHOOL DISTRICT IN OPPOSITION TO A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

ANTON W. BIGMAN
210 Fort Pitt Common
445 Fort Pitt Boulevard
Pittsburgh, Pa. 15219
(412) 471-2644

LINDA R. BLUMKIN*
LEONARD BENGTICH
FRIED, FRANK, HARRIS, SHRIVER
& JACOBSON
(A partnership which includes professional corporations)
One New York Plaza
New York, N.Y. 10004
(212) 820-8000

* *Counsel of Record for Respondent General Braddock Area School District*

QUESTIONS PRESENTED

1. Did the court of appeals correctly affirm the district court's finding that the school authorities' establishment of a black school district surrounded by white districts constituted de jure segregation in violation of the Fourteenth Amendment?

2. Did the court of appeals correctly affirm the district court's order consolidating the black school district with four surrounding white districts to remedy the constitutional violation?

PARTIES BELOW

Dorothy Hoots, individually and as mother of her children Janelle Hoots and Jamie Hoots; Mrs. Addrallace Knight, individually and as mother and natural guardian of her children Ronald Knight, Loretta Knight, Terrance Knight, Marc Knight and Byron

Knight; Barbara Smith, individually and as mother and natural guardian of her children Tawanda Smith, Tevela Smith, Joseph Smith, Wesley Smith and Eric Smith; General Braddock Area School District;

Appellees;

Commonwealth of Pennsylvania; Pennsylvania State Board of Education and its Chairman, W. Deming Lewis; Allegheny Intermediate Board of School Directors, and its President, Edward X. Hallenberg; Churchill Area School District; Edgewood School District, Swissvale Area School District; Turtle Creek Area School District;

Appellants.

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OPINIONS BELOW

The opinion of the Third Circuit affirming the district court in all respects is reported at Hoots v. Commonwealth of Pennsylvania, 672 F.2d 1107 (1982). The district court's opinion finding a constitutional violation is reported at Hoots v. Commonwealth of Pennsylvania, 359 F. Supp. 807 (W.D. Pa. 1973). One of the district court's two opinions on the remedy ordered in this case is reported at Hoots v. Commonwealth of Pennsylvania, 510 F. Supp. 615 (W.D. Pa. 1981). The other decision is unpublished, but has been reprinted as Appendix E to the Joint Appendix filed by Swissvale Area School District, Edgewood School District and Turtle Creek Area School District.

JURISDICTION

This Court has jurisdiction to review the final judgment of the Third Circuit, entered on February 1, 1982, pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Fourteenth Amendment, Section 1:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

Rule 19(a), Federal Rules of Civil Procedure.

24 P.S. §2-281, et seq. (Act 561).

24 P.S. §2-290, et seq. (Act 299).

24 P.S. §2-2400.1, et seq. (Act 150).

Standards for Reorganization under Act 299.

Standards for Reorganization under Act 150.

The texts of Rule 19(a), Federal Rules of Civil Procedure, relevant Pennsylvania statutes, and the Standards of Reorganization of school districts are set forth in Appendix D to the Churchill Area School District's Petition for Certiorari.

STATEMENT OF THE CASE

This lawsuit was commenced in 1971 to correct a condition of intentional de jure segregation brought about as a result of the statutorily mandated consolidation of school districts in the central eastern area of Allegheny County, east of Pittsburgh.[1] This brief is submitted by

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1 This case has been extensively reported. The principal decisions to which reference will be made are:
Hoots v. Commonwealth of Pennsylvania, 334 F. Supp. 820 (W.D. Pa. 1971) (Hoots I)
Hoots v. Commonwealth of Pennsylvania, 359 F. Supp. 807 (W.D. Pa. 1973) (Hoots II)
Hoots v. Commonwealth of Pennsylvania, 495 F.2d 1095 (3d Cir.), cert. denied, 419 U.S. 884 (1974) (Hoots III)
Hoots v. Commonwealth of Pennsylvania, 587 F.2d 1340 (3d Cir. 1980) (Hoots IV)
Hoots v. Commonwealth of Pennsylvania, 639 F.2d 972 (3d Cir. 1981) (Hoots V)
Hoots v. Commonwealth of Pennsylvania, 510 F. Supp. 615 (W.D. Pa. 1981) (Hoots VI)
Hoots v. Commonwealth of Pennsylvania,
(Footnote Continued)

respondent General Braddock Area School District ("General Braddock") whose "intentional creation as a racially identifiable black school district constituted the constitutional violation found in this case." Hoots VIII, (892a).[2]

The complaint in this case did not allege, and respondents have never asserted that there was de jure school segregation in Pennsylvania prior to the statutory program of mandatory school district

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1 (Footnote Continued)

No. 71-258 (W.D. Pa. April 16, 1981) (Hoots VII)
Hoots v. Commonwealth of Pennsylvania, No. 71-258 (W.D. Pa. April 28, 1981) (Hoots VIII)
Hoots v. Commonwealth of Pennsylvania, 672 F.2d 1107 (3d Cir. 1982) (Hoots IX).

2 All citations in the form "(___ a)" refer to the page in the record on appeal to the Third Circuit.

consolidation which began in 1961. Rather, the complaint alleged, and the district court and court of appeals found, that it was the entire process by which the boundaries of the school districts in this portion of central eastern Allegheny County were redrawn that constituted the constitutional violation and gave rise to the condition of de jure segregation found, and remedied, by the district court.

A. The Consolidation Process

The consolidation program was mandated by a series of related statutes: the Act of September 12, 1961, P.L. 1283, No. 561, 24 P.S. §2-281 et seq. (Act 561); the Act of August 8, 1963, P.L. 564, No. 299, 24 P.S. §2-290 et seq. (Act 299); and the Act of July 8, 1968, P.L. 299, No. 150, 24 P.S. §2400.1 et seq. (Act 150). Prior to Act 561, the Public School Code of 1949,

Act of March 10, 1949, P.L. 30, Art. 2, §201, 24 P.S. §2-201 (as amended) provided that each city, incorporated town, borough or township shall constitute a separate school district. Thus, school districts generally were coterminous with municipalities.

Over the period of consolidation, the relevant state and county boards combined white districts with one another -- or left them independent -- rather than join them with one or more of General Braddock's three predecessor districts. As part of the constitutional violation alleged and proven in this case, the white districts located near General Braddock's predecessor districts of Braddock, North Braddock and Rankin, were removed seriatim from consideration as possible merger candidates.

On December 18, 1962 the Allegheny County Board of School Directors ("County

Board") adopted a school reorganization plan pursuant to Act 561. This proposal recommended the consolidation of the following school districts: Braddock (36.16% black);[3] North Braddock (11.02% black); Rankin (35.39% black); East Pittsburgh (3.85% black); and Braddock Hills (11.75% black).[4] Despite

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3 The figures set out in parentheses reflect the percentage of non-white population in the identified school district as of 1970. See, Hoots II, 359 F. Supp. at 816. The non-white enrollments as of 1964 for each district, to the extent they are available are as follows: Braddock - 57%; Churchill-0.16%; East Pittsburgh - 14%; Edgewood-0.00%; North Braddock - 14%; Rankin-46%; Swissvale - 5.5%; Turtle Creek-0.00%. See, exhibit 17 (331a-337a). The admissibility of this exhibit was stipulated to. (703a).

4 By the end of the reorganization process, after all the other neighboring districts had been consolidated with one another or allowed to remain independent, Rankin, Braddock and North Braddock were consolidated to form General Braddock. 359 F. Supp. at 819.

its adoption by the County Board, this plan was not reviewed by the State Board of Education (the "State Board") and could not be effectuated because Act 561 was superseded by Act 299. (696a). Had this proposal been adopted, the population of the new district would have been less than 30% black. See, Hoots II, 359 F. Supp. at 816, finding of fact 35.[5]

On May 11, 1964, pursuant to Act

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5 General Braddock does not suggest that this particular consolidation of districts would have been free of constitutional impediment. Rather, the racial statistics that would have resulted from various formally proposed (but ultimately abandoned or rejected) combinations are cited merely to underline, as the district court found, 359 F. Supp. at 819, that the creation of General Braddock resulted in the highest possible percentage of minority population and that specific proposals which would have resulted in less segregation were killed during the consolidation process.

299, the County Board proposed the consolidation of Braddock, North Braddock, Rankin, Turtle Creek (0.18% black) and East Pittsburgh. (696a). Although the Braddock and Rankin districts supported this proposal, it was opposed by Turtle Creek and East Pittsburgh -- both of which immediately appealed to the State Board seeking a modification of the proposal -- and by North Braddock. The East Pittsburgh-Turtle Creek appeal was heard on October 23, 1964; the hearing on North Braddock's opposition to the Plan was held on March 24, 1965. Even without the inclusion of Braddock Hills -- which had been suggested in the County Board's proposal under Act 561 -- the student population in this district, in 1967, would have been in excess of 73% white. Hoots II, 359 F. Supp. at 817, finding of fact 42.

At the March 24, 1965 hearing,

James Rowland, a member of the State Board, inquired as to the racial composition of the schools involved in the County Board's proposal. There was testimony at that hearing showing that in Braddock, one elementary school was 55% black, while a second was 95% black; the junior high school was 80% black, while the high school was 40% black. In Rankin the high school was 40%, and the elementary school 51% black. In North Braddock the schools were approximately 8 or 9% black, with Braddock Hills approximating 10% black. (697a-698a). In East Pittsburgh the black school population approximated 6% as of 1967 (332a), while Turtle Creek at that time had no blacks attending its schools. Id. Turtle Creek and East Pittsburgh suggested that they be merged to form their own district, or, in the alternative, that they be

included in another district, such as Churchill (0.11% black).[6]

On November 25, 1965 the State Board granted the Turtle Creek-East Pittsburgh request and merged them into a separate district. This district was consolidated under Act 150 which superseded, with few substantive changes, Act 299. (699a).[7]

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6 Churchill was formed on July 1, 1966 through consolidation of Forest Hills (0.27% black), Wilkins Township (0.56% black) and Chalfont (0.88% black) under Act 299. As a matter of state law, as it concedes, Churchill Petition at 4, it was, under Act 299, as it had been under Act 561, available for additional consolidation. Churchill's formation as an essentially all-white district, and its subsequent nonjoinder with neighboring districts during the subsequent stages of the reorganization process were pursuant to the constitutional violation found here.

7 Both Act 299 and Act 150 provided that the County Board's proposals and the State Board's review and consideration (Footnote Continued)

On October 7, 1968, pursuant to Act 150, the County Board adopted a reorganization plan proposing the consolidation of Braddock, North Braddock and Rankin into a single district; the consolidation of East Pittsburgh and Turtle Creek into a single district; the consolidation of Swissvale and Braddock Hills into another district; and that Edgewood district (1.29% black) should remain as a separate school district. (700a).

On September 14, 1968, however, prior to the adoption of this proposal, the County Board conducted hearings at which

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7 (Footnote Continued)

of such proposals were to be in conformity with certain statutory and administrative standards and guidelines relating to the ability of any newly consolidated district to provide a comprehensive education. Hoots II, 359 F. Supp. at 812, finding of fact 11.

Braddock, North Braddock and Rankin opposed the proposal consolidating them into a single district. The testimony at that hearing showed that: (1) the creation of a larger district was necessary given the unsound financial position of the three districts; (2) there would be an extreme economic burden placed on North Braddock and upon Rankin, especially in light of Rankin's substantial indebtedness; and (3) the resulting district would be racially imbalanced because it would consist of a pupil population in excess of 45% black, while the adjacent school district resulting from the East Pittsburgh-Turtle Creek consolidation would have a pupil population less than 5% black. (700a-701a). After the County Board adopted the proposal notwithstanding the testimony presented at the September hearings, Braddock, North

Braddock and Rankin appealed to the State Board for a modification of the proposal. A hearing before the State Board was held on February 25, 1969, at which time the State Board admitted into its record enrollment statistics prepared by the Human Relations Commission of Pennsylvania, broken down by race, for each school district of Allegheny County. On May 9, 1969 the State Board upheld the consolidation of Braddock, North Braddock and Rankin into one district -- General Braddock, the present respondent. (702a).

General Braddock was created as of July 1, 1971. Before the end of the first school year following the consolidation, the school district was found to be distressed -- bankrupt -- by the Allegheny County Court of Common Pleas, in April of 1972. In Hoots VIII, almost a full decade after General Braddock had been established,

the district court, in its decision imposing the remedy, found that the student population of General Braddock in April of 1981 was 63% black. (892a).

B. The Litigation

Plaintiffs commenced this action on June 9, 1971 alleging that their rights under the Equal Protection Clause of the Fourteenth Amendment and under the Federal Civil Rights Act, 42 U.S.C. §§1981, 1983 had been violated. In December of 1971 the district court denied the defendants' motion to dismiss stating there was "no doubt that the allegations of deliberate creation of a racially segregated school district state a cause of action". Hoots I, 334 F. Supp. 820, 822. In addition, although the district court denied the defendants' motion for the compulsory joinder of the individual school districts as indispensable

parties, it noted that the districts would be permitted to intervene if they so chose and "insisted [the Commonwealth] give them notice" of the suit. Id. at 821, 823. Despite a written request by the Attorney General of Pennsylvania urging them to "intervene in this action immediately," the districts chose not to intervene and informed the court that they had "no interest in being" in the lawsuit, and were "deliberately not intervening." Id. at 821.

The trial of this action began on December 5, 1972. On May 15, 1973 the district court held that General Braddock, "racially identifiable as a black school district," Hoots II, 359 F. Supp. at 817, finding of fact 40, was created as the result of intentional racial segregation. The district court held that the State and County Boards "knew or should have known

they were creating a racially segregated school district as of the dates they proposed and approved" of General Braddock. Id. at 818, finding of fact 50. Indeed, while noting that the "natural foreseeable and actual effect of combining Braddock, North Braddock and Rankin into one school district was to perpetuate, exacerbate and maximize racial segregation" within the area, id. at 821, finding of fact 57, the district court specifically found that as of the time the Boards proposed and approved the consolidation plans, "no other combination of school districts within this portion of Allegheny County would have created a school district (of at least 4,000 pupils as required by Act 150) with as large a percentage of nonwhite enrollment." Id. at 819, finding of fact 51. The court ordered the Commonwealth defendants to

prepare a comprehensive plan of desegregation which plan would "alter the boundary lines of the General Braddock Area School District and, as appropriate, of adjacent and/or nearby school districts." Id. at 824.

It was not until June 1973, some six months after the trial had ended, that Turtle Creek and Churchill sought to intervene and be heard on the question of the constitutional violation, already ruled upon by the district court. The district court denied the motions as untimely, and the Third Circuit affirmed their denial. Hoots III, 495 F.2d 1095 (3d Cir.), cert. denied, 419 U.S. 884 (1974).[8] While the ap-

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8 Petitioners are still trying to relitigate the law of the case with respect to their untimely intervention attempt. Although the school districts had "clear warning" early on

(Footnote Continued)

peal was pending, Turtle Creek and

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8 (Footnote Continued)

from the Commonwealth's Attorney-General of the "likely necessity for intervention," they made a deliberate choice not to appear. Hoots III, 495 F.2d at 1097. Even if the petitioner districts met the standards for necessary or indispensable parties, which General Braddock denies and the district court correctly refused to find, Hoots I, 334 F. Supp. 820, their nonjoinder was harmless error because of their deliberate choice to reject the court's contemporaneous offer of intervenor status. Moreover, the courts have refused to countenance such dilatory conduct. See, e.g., Provident Tradesmens Bank and Trust Co. v. Patterson, 390 U.S. 102 (1968); Morgan Guaranty Trust Co. v. Martin, 466 F.2d 593 (7th Cir. 1972) (holding that one who knows of the pendency of an action which may affect his interests and specifically disclaims an interest in the action will not be regarded as an indispensable party). In any event, the districts had the opportunity -- of which they availed themselves -- to submit evidence with respect to liability during the remedy hearings. That evidence -- notably the testimony of Dr. Paul Christman, Chairman of the State Board (2701a-2705a, 2737a, 2761a- 2762a), -- strongly supported,

(Footnote Continued)

Churchill were joined by the other school districts, who sought to intervene and be heard on the desegregation plan submitted by the Commonwealth in compliance with the court's order. The district court permitted intervention on the question of remedy.

Over the course of seven years, from 1973 to 1980, the district court held extensive hearings on various consolidation and other types of plans proposed by the Commonwealth. Throughout this remedial period, plaintiffs attempted to appeal to the Third Circuit in order to obtain relief. The first appeal, from an order denying approval of one of the Commonwealth's consoli-

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8 (Footnote Continued)

rather than negated, the District Court's liability holding in Hoots II and was before the court when it explicitly reaffirmed its liability decision in Hoots II, in light of Keyes. (2739a, 2761a).

dation plans, was dismissed for lack of appellate jurisdiction. Hoots IV, 587 F.2d 1340 (3d Cir. 1978). Subsequently, on two occasions, plaintiffs sought an order of mandamus from the court of appeals directing the imposition of a remedy. Hoots v. Weber, No. 79-1474 (3d Cir. May 2, 1979); Hoots v. Weber, No. 80-2124 (3d Cir. September 9, 1980). In a second appeal, the Third Circuit directed the district court to expedite its consideration of the remedial questions before it so as to issue a remedy within 90 days, in order to implement that plan for the 1981-1982 school year. Hoots V, 639 F.2d 972 (3d Cir. 1981).

In an opinion issued on March 5, 1981, the district court reaffirmed its findings and conclusions issued in 1973, and stated that an interdistrict remedy could properly include those school

districts adjacent or near to General Braddock. Rejecting the districts' arguments that they were not involved in the violation and therefore could not be implicated in such a remedy, the district court held that "[a] multidistrict remedy can be applied to surrounding districts that have not been found to have committed a constitutional violation themselves where their boundaries were drawn or redrawn during the course of the same violation which created the segregated school districts." Hoots VI, 510 F. Supp. 615, 619. On April 28, 1981, after additional hearings, the district court ordered that certain districts neighboring General Braddock -- petitioners -- be consolidated and merged into a single school district, known as the Woodland Hills School District.

Petitioners appealed from the

district court's order directing the imposition of this remedy. Petitioners also appealed the court's findings of segregative intent on the part of the State and County Boards in the creation of General Braddock. On February 1, 1982, the Third Circuit affirmed the district court in all respects. Hoots IX, 672 F.2d 1107 (3d Cir. 1982). With respect to the issue of the standard applied by the district court to determine whether a constitutional violation occurred, the court of appeals held that "there is no question that the district court utilized the correct legal standard -- [the requirement of proof of] intentional or purposeful segregation." Id. at 1116. With respect to the propriety of the remedy, the court of appeals held that the district court "tailored the relief granted to fit the actual showing of de jure

discrimination by all of the districts involved. Indeed, the remedy fashioned by the district court here was narrowly drawn." Id. at 1120. And, the court held that "the district court did not abuse its discretion in fashioning its multidistrict remedy. Indeed, the district court's action fully complie with all applicable standards and was supported by more than enough evidence." Id. at 1124.

It is from the judgment of the Third Circuit that petitioners seek a writ of certiorari.

SUMMARY OF ARGUMENT

Certiorari is inappropriate in this case because the lower courts have correctly applied well-established Supreme Court precedent. There are no novel issues of law nor conflicting circuit court decisions requiring this Court's resolution. Certiorari has consistently been denied in

recent cases raising the same arguments on similar facts.

The lower courts properly applied the standard of segregative intent set forth in Keyes v. School District No. 1, 413 U.S. 189 (1973) and succeeding cases and the remedial rule of Milliken v. Bradley, 418 U.S. 717 (1974) and its progeny. Petitioners' efforts to frame eyecatching issues notwithstanding, the lower courts did not hold: that intent can be based solely on foreseeability of disparate impact,[9] that a difference in racial mix alone violates the Equal Protection Clause,[10] or that a failure to maximize de-

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9 Commonwealth Petition at i.

10 Churchill Petition at i; Hallenberg and County School Board Petitions at i.

segregation alone is unlawful.[11] Nor did the lower courts impose a remedy on school districts not "involved" in the constitutional violation.[12]

Rather, on the basis of all the evidence, the district court found -- and the circuit court affirmed -- that the plaintiff's established a legally sufficient case of intentional discrimination that the school authorities failed to rebut. Moreover, the district court properly fashioned -- and the circuit court affirmed -- an interdistrict remedy including only those districts the establishment of which derived from the unlawful line-drawing process and which were thus irrefutably "involved" in

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11 Edgewood-Turtle Creek Petition at i.

12 See Churchill Petition at i; Swissvale Petition at i; Hallenberg and County School Board Petitions at i.

the violation.

Prior to the consolidations at issue, there were fifteen rather than five school districts in the relevant part of central eastern Allegheny County. The Commonwealth of Pennsylvania, not this case, abolished those traditional boundaries. Once the Commonwealth undertook redistricting, it assumed the burden of acting without racial bias. Because the Commonwealth failed to meet that responsibility, the remedial powers of the federal courts were properly brought to bear.

REASONS FOR DENYING THE WRIT

I. THE DISTRICT COURT AND THE COURT OF APPEALS PROPERLY APPLIED THIS COURT'S WELL ESTABLISHED STANDARDS REQUIRING PROOF OF INTENTIONAL DISCRIMINATION

The applicable standard for proving segregative intent in Northern school desegregation cases is clearly set forth, for present purposes, in the decisions of this Court, including Keyes v. School District No. 1, 413 U.S. 189 (1973); Washington v. Davis, 426 U.S. 229 (1976); Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977); and Columbus Board of Education v. Penick, 443 U.S. 449 (1979). These cases teach that discriminatory intent may be established through the use of presumptions and inferences as well as direct and circumstantial evidence. See, e.g., Washington v. Davis, supra, 426 U.S. at 242

("an invidious discriminatory purpose may often be inferred from the totality of the relevant facts."); Arlington Heights, supra, 429 U.S. at 266 ("Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available."); Columbus Bd. of Ed., supra, 443 U.S. at 464 ("actions having foreseeable and anticipated disparate impact are relevant evidence to prove the ultimate fact, forbidden purpose."). They require that plaintiffs establish merely that race was "a" factor, and not the "sole" or "predominant" factor, in order to make out a prima facie case of a constitutional violation. Arlington Heights, supra, 429 U.S. at 265 ("Davis does not require a plaintiff to prove that the challenged action rests solely on

racially discriminatory purposes."].

Despite the fact that the district court's May 15, 1973 decision, Hoots II, 359 F. Supp. 807, setting forth its findings of fact and conclusions of law was handed down prior to this Court's decision in Keyes, it is clear that the district court nevertheless applied the appropriate standard. At the outset of this case, for example, the district court denied the defendants' motion to dismiss because it recognized that the complaint alleged that "[i]n preparing and adopting the school reorganization plans defendants intentionally and knowingly created racially segregated school districts." Hoots I, 334 F. Supp. at 821-822. And, in Hoots II, its first decision on the merits, the district court concluded that:

> A violation of the Fourteenth Amendment has occurred when public

> school authorities have made educational policy decisions which were based wholly or in part on considerations of the race of students and which contributed to increasing racial segregation in the public schools.

359 F. Supp. at 822. As the Third Circuit noted, "This is the language of intention and purpose." 672 F.2d at 1115. Additionally, on October 24, 1975, after Keyes was handed down, the district court permitted additional testimony and argument on the violation issue. In the course of these hearings, counsel for Churchill asserted that the district court "would have come to a different conclusion if [it] were making [its] Order on those facts after Keyes". The district court flatly disagreed, noting that "this is one place where you can say [you are] 100 percent wrong." (2739a). Indeed, the court that day, after a review of the issue, reaffirmed its earlier finding

of a "purposefully" segregated school district. (2761a).

In addition to applying the appropriate legal standard, the district court found ample evidence in the record to support its finding of purposeful segregation. The court of appeals reviewed no fewer than nine facts or inferences found by the district court. These included the following: (1) testimony from a local school official that he and others had pressured the State and County Boards to insulate the white districts from the others because of "the black issue"; (2) evidence of a State Board staff report that racial considerations influenced and motivated the opposition of certain districts to a merger with Braddock, Rankin and North Braddock; (3) a statement tending to indicate that the County Board did not consider Churchill for any merger

because Churchill opposed such moves on the basis of racial concerns; (4) a statement by the president of the County Board that the Board was "painfully aware of [the fact] that . . . over the years the surrounding school districts had sought to avoid a school merger which would include Braddock and Rankin in their school district and that it looked like [North] Braddock was going to be 'left holding the bag'." 672 F.2d at 1115-1118.

Based on these and other findings, the district court found that the State and County Boards were influenced by the manifest desires of the surrounding communities "to avoid being placed in a school district with Braddock and Rankin because of the high concentration of blacks within these two municipalities." 359 F. Supp. at 821. Consequently, the district court concluded that "race was a factor" in the formation

of General Braddock. 359 F. Supp. at 821, reaffirmed, 510 F. Supp. at 619; Hoots IX, 672 F.2d at 1116. In addition, it found "no evidence" that the consolidation plans or the configuration of the school districts were "rationally related to any legitimate purpose and [that] . . . those boundaries did not promote any valid state interest." 510 F. Supp. at 619, reaffirming 359 F. Supp. at 821, 822.

The district court found it significant that the State and County Boards disregarded many of the statutory and administrative guidelines established in order to facilitate the creation of school districts capable of providing abusive education. 359 F. Supp. at 819-20, finding of fact 52. Perhaps the most telling example of this point is that except for Churchill and General Braddock, each of the other

districts was created with less than the minimum number of students required by the guidelines. Id.

Thus, in addition to the direct and circumstantial evidence and the permissible findings of foreseeable effect, see, Columbus Bd. of Ed., supra, the conscious, systematic departures from the established guidelines, see, Arlington Heights, supra, provide ample evidence that the district court properly required proof of purposeful intent and that such proof, both direct and inferential, was and continues to be permissible evidence under the decisions of this Court. Id. There is no serious question that the district court properly considered and weighed the direct and circumstantial evidence presented to it. As the court of appeals found, after conducting its own exhaustive review of the record:

> The district court properly weighed evidence such as [1] the Board members' admitted knowledge that their redistricting decisions would cause and perpetuate segregation, [2] the foreseeability of the segregative result, [3] the Boards' formulation of boundaries that promoted no interest other than racial segregation, [4] the Boards' rejection of alternative school district configurations in favor of a segregation-maximizing alternative, and [5] the State Board's blatantly improper interpretation of its own "race regulation" to endorse the very evil the regulation was designed to prevent.

672 F.2d at 1118 (footnote omitted).

Petitioners seek to avoid both the district court's application of Keyes and its well-supported findings of segregative intent. Their arguments mischaracterize both the holdings of this Court and the findings of the district court. Churchill, for example, argues that there simply was no violation, that the district court merely attempted to correct a condition which

Churchill perceives as de facto racial imbalance, a condition it asserts was not brought about by the actions of the school authorities. Churchill Petition at 17. While General Braddock concedes that the district court would not have been permitted to impose such a remedy for the sole purpose of redressing a de facto racial imbalance, as has been demonstrated, there is ample support in the record to support the district court's findings of purposeful and intentional de jure segregation, as the court of appeals determined. See generally, Hoots IX, 672 F.2d at 1115-1118.

In a similar vein, Edgewood School District, Turtle Creek Area School District, and the Commonwealth of Pennsylvania seriously misstate both the findings of the district court and its application of this Court's standards regarding the use of

foreseeable consequences as some proof from which the court may infer segregative intent. Contrary to Edgewood's and Turtle Creek's assertions, the district court's decision was not based solely upon a finding that the State and County Boards' failure to take proper account of the foreseeability of the discriminatory impact of their actions and policies was sufficient to constitute de jure segregation. Edgewood-Turtle Creek Petition at 19; Commonwealth Petition at i. Indeed, as has been set out, supra, the Third Circuit identified this factor as only one of the district court's many major factual conclusions, see, 672 F.2d at 1115-1116, in addition to its review of nine examples of direct and circumstantial evidence relied upon to find a violation. See, id. at 1117-1119.

Petitioner Swissvale, for its part, suggests that this Court's decision in Arlington Heights precludes a finding of a constitutional violation unless the district court determines that the action or conduct complained of "would not have been taken but for the racial motive." Swissvale Petition at 13. Swissvale relies on footnote 21 of that decision and Mt. Healthy City Board of Education v. Doyle, 429 U.S. 274 (1977), cited therein. Neither of these authorities is support for the application of such a standard in this case. In Mt. Healthy this Court did no more than hold that where constitutionally protected conduct is found to be a motivating factor in the state's decision, the burden of proof shifts to the decisionmaker -- here the school authorities -- to demonstrate that the same decision would have been reached

even absent this constitutional aspect. Similarly, in footnote 21 in Arlington Heights, the Court indicated that the establishment that governmental action was motivated in part by a racially discriminatory purpose shifts to the government entity the "burden of establishing that the same decision would have resulted even had the impermissible purpose not been considered." 429 U.S. 270-71 n.21. Petitioners have failed to meet their burden of disproving causation. As early as 1973, the district court held that once segregative intent is demonstrated, "the school authorities bear the burden of showing that [their] policies are based on educationally required, non-racial considerations." 359 F. Supp. at 823, conclusion of law 4. The district court correctly placed this burden on the school authorities -- petitioners -- and found that they completely

failed to carry their burden of proof: "The Record contains absolutely no evidence showing that the school district boundaries established in the County and State Boards' Plan of organization of administrative units are rationally related to any legitimate purpose and this Court finds that such boundaries do not promote any valid state interest." Id. at 821. Here, proof of segregative intent permeates each step of the reorganization process, and such proof is dispositive where, as here, there was an absence of any rebuttal evidence.

II. HAVING FOUND A CONSTITUTIONAL VIOLATION, THE DISTRICT COURT APPLIED THE APPROPRIATE STANDARDS ESTABLISHED BY THIS COURT IN FASHIONING AN INTERDISTRICT REMEDY INVOLVING ONLY THOSE DISTRICTS FOUND TO HAVE BEEN INVOLVED IN OR AFFECTED BY THE VIOLATION

The applicable standard for applying multidistrict remedies in school desegregation cases is clearly set forth for redistricting cases in Milliken v. Bradley, 418 U.S. 717 (1974) (Milliken I). Milliken I built upon the basic equitable principle enunciated in Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 16 (1971), that "the scope of the remedy is determined by the nature and extent of the constitutional violation." Thus, after citing Swann, Milliken I held:

> Before the boundaries of separate and autonomous school districts may be set aside by consolidating the separate units for remedial purposes or by imposing a cross-district remedy, it must first be shown that there has been a consti-

> tutional violation within one district that produces a significant segregative effect in another district. Specifically, it must be shown that racially discriminatory acts of the state or local school districts, or of a single school district have been a substantial cause of interdistrict segregation. Thus an interdistrict remedy might be in order where the racially discriminatory acts of one or more school districts caused racial segregation in an adjacent district, or where the district lines have been deliberately drawn on the basis of race. In such circumstances an interdistrict remedy would be appropriate to eliminate the interdistrict segregation directly caused by the constitutional violation. Conversely, without an interdistrict violation and interdistrict effect, there is no constitutional wrong calling for an interdistrict remedy.

418 U.S. at 744-745 (emphasis added).

The district court properly found that an interdistrict remedy can be imposed against all those school districts whose "boundaries were drawn or redrawn during the course of the same violation which created

the segregated school districts." 510 F. Supp. at 619. The district court correctly interpreted Milliken I as holding that an interdistrict remedy may be imposed where the condition of segregation in one district can be shown to result either from the segregative acts in an adjoining district or from the line-drawing process itself. The district court properly applied the Milliken I standard by requiring that each district affected by its order be implicated or involved in the violative conduct. Here, as both courts below have found, this conduct was the consolidation process itself, the line-drawing undertaken by the State and County Boards. Where, as here, state officials have contributed to the separation of the races by redrawing district lines, Milliken I recognizes the compelling need for interdistrict relief.

Petitioners' argument that an interdistrict remedy is inappropriate because the surrounding districts are "innocent" of any wrongdoing replicates similar arguments already rejected in numerous post-Milliken appellate decisions. The flaw in this argument was elegantly and concisely exposed in United States v. Board of School Commissioners, 573 F.2d 400, 410 (7th Cir.), cert. denied, sub nom., Bowen v. United States, 439 U.S, 824 (1978):

> The commands of the Fourteenth Amendment are directed at the state and cannot be avoided by a fragmentation of responsibility among various agents. Cooper v. Aaron, 358 U.S. 1, 15-17 (1958). If the state has contributed to the separation of the races, it has the obligation to remedy the constitutional violations. That remedy may include school districts which are its instrumentalities and which were the product of the violation.

See, e.g., Morrilton v. United States, 606 F.2d 222 (8th Cir. 1979), cert. denied, 444

U.S. 1071 (1980); United States v. State of Missouri, 515 F.2d 1365 (8th Cir. 1975).[13]

The district court, as the court of appeals found, did not exceed the proper limits on its remedial authority by including petitioners in its remedial district. Contrary to the assertions of Churchill, Edgewood and Turtle Creek, the district court's remedial authority was not limited to a consideration of those consolidation plans which the State and County Boards would have implemented. Churchill Petition at 19; Edgewood-Turtle Creek Petition at 18. This Court early on stated that "[o]nce a right and a violation have been

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13 Contrary to the assertion of the Borough of Edgewood, Amicus Curiae, at 15-19, the courts of appeals have consistently and properly applied Milliken without any conflict. Differences in result among the cases cited by Edgewood Borough are explained by the different facts of the cases and not by their failure properly to apply Milliken.

shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies." Swann, supra, 402 U.S. at 15 (1971). See also, Milliken v. Bradley, 433 U.S. 267, 288 (1977) (Milliken II).

The statement in Milliken I that the remedy should be broad enough to restore the plaintiffs "to the position they would have occupied in the absence of such [unconstitutional] conduct", 418 U.S. at 746, has not been construed to require the district court to second-guess what the discriminatory state authorities would have done but for their wrongful intent. Rather the remedial plan devised and adopted by a district court must simply be broad enough to completely eradicate the de jure discrimnation. See, Milliken II, supra, 433 U.S.

at 282; Morrilton, supra, 606 F.2d at 229-30.

Churchill's argument that it was unavailable for merger with what later became General Braddock ignores the Milliken I rule. Churchill asserts that the district court must determine "what the conditions would have been but for the alleged constitutional violation." Churchill Petition at 19. Where, as here, there were more than fifteen school districts affected by the State and County Boards' redistricting plans, and where numerous consolidation plans were proposed in the course of the decade-long consolidation process, it would be both impossible and impractical to attempt to recreate that exact set of conditions which would have been "but for" the violation. This is especially so where the consolidation process itself is the essence

of the violation. Indeed, absent the constitutional violation, any number of consolidation plans could or would have been appropriate. Although any number of other combinations were possible, the only question on appeal is whether the remedy constituted an abuse of discretion. Dayton Board of Education v. Brinkman, 433 U.S. 406, 417-418 (1977). And, as the court of appeals noted, rather than having abused its discretion, the district court "very ably dealt with all of the intricate, complex and hotly contested issues in this case since 1971." 672 F.2d at 1120, n.12.

Swissvale asserts that a "school district may not be ordered out of existence as part of a multidistrict desegregation remedy unless there has been an affirmative showing -- not merely an unrebutted presumption -- that the inclusion of that

district is necessary to eliminate the segregative effects 'directly caused by the constitutional violation'." Swissvale Petition at 21. This suggestion has no support in precedent. In any event, this argument is irrelevant in the present case given that the district court's decision as to the propriety of the interdistrict remedy was based on a full, factual record rather than on bare unrebutted presumptions, as Swissvale misleadingly suggests. This record was compiled over the ten-year duration of the district court proceedings and took full account of the evidence offered by all parties. See generally, Hoots VIII, (884a-895a); see also (1750a-1756a; 1760a-1765a; 1800a-1804a).

While, as Swissvale notes, the court of appeals invoked the burden-shifting presumption of Keyes (as applied

in a multidistrict context in Evans v. Buchanan, 582 F.2d 750, 764-66 (3d Cir. 1978) (en banc), cert. denied, 446 U.S. 923 (1980)), with respect to the propriety of the remedy, 672 F.2d 1121, the court of appeals did not rely solely on this presumption. Moreover, a thorough review of both remedy decisions, Hoots VI and Hoots VIII, reveals that the district court did not even consider, let alone employ, this shift. Thus, Swissvale's assignment of error to the court of appeals on this point -- note that Swissvale does not attribute the alleged error to the district court, Swissvale Petition at 20-22 -- is irrelevant, unsupported by the district court's record and need not be addressed by this Court.

In Hoots VI, the district court dealt with the question of "which, if any, of the surrounding school districts can be

included in any remedy within the guidelines of" Milliken I. 510 F. Supp. at 616. After a review of the Milliken I standard, the district court found that "[t]his case clearly falls within Milliken I guidelines for an interdistrict remedy, since racially discriminating acts of the state have been a substantial cause of interdistrict segregation." Id. at 619. In order to comply with Milliken I, the district court employed a two-step analysis. The first step was to identify the geographical area involved in the violation. The second step was to determine which of those districts involved in the violation must be included in order for the remedy to be meaningful. The district court, in its determination of the geographic area of the violation, determined, for example, that Steel Valley and West Mifflin school districts were not involved.

Hoots VIII, (891a). In April 1981, the district court conducted the second step of its analysis. At that time it considered the inclusion of the six school districts which were found to have been involved in the violation in addition to General Braddock. Only four of these districts -- petitioners -- were included in the remedy. The district court determined that the inclusion of Gateway and East Allegheny was not called for because it would not have alleviated the segregative effect of the violation. Id. As the court of appeals recognized, the remedy imposed was narrower than the geographic scope of the violation. 672 F.2d at 1120. Thus, rather than being overbroad, as petitioners allege, the remedy was in fact fashioned to cause minimum disruption to existing district boundaries while simultaneously accomplishing its necessary remedial functions.

CONCLUSION

For the reasons set forth above, the Petitions for Certiorari should be denied.

Respectfully Submitted,

Linda R. Blumkin*
Leonard Benowich
FRIED, FRANK, HARRIS,
SHRIVER & JACOBSON
(A partnership which
includes professional
corporations)
One New York Plaza
New York, New York 1000
(212) 820-8000

* Counsel of Record fo
Respondent General
Braddock Area
School District

Of Counsel:

Anton W. Bigman
210 Fort Pitt Common
445 Fort Pitt Boulevard
Pittsburgh, Pa. 15219
(412) 471-2644

Amicus Brief

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CLERK

In the Supreme Court of the United States

October Term, 1981

CHURCHILL AREA SCHOOL DISTRICT,
Petitioner,

vs.

DOROTHY HOOTS, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

~~MOTION BY~~ AMICUS CURIAE, BOROUGH OF CHURCHILL, FOR LEAVE TO FILE BRIEF AND BRIEF IN SUPPORT OF THE GRANT OF A WRIT OF CERTIORARI

ROBERT W. GOEHRING
1508 Law & Finance Building
Pittsburgh, Pennsylvania 15219
Solicitor for the Borough of Churchill

Financial Press Corporation, Pittsburgh

No. 81-

In the
Supreme Court of the United States
October Term, 1981

CHURCHILL AREA SCHOOL DISTRICT,
Petitioner,

vs.

DOROTHY HOOTS, *et al.*,
Respondents.

MOTION FOR LEAVE TO FILE THE ATTACHED BRIEF OF THE BOROUGH OF CHURCHILL, PENNSYLVANIA APPEARING, AMICUS CURIAE, IN SUPPORT OF PETITIONER'S PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

NOW COMES the Borough of Churchill through its solicitor and moves this Honorable Court for leave to file its Brief pursuant to Rule 36.4 of the Rules of the Supreme Court of the United States, in support of Petitioner's Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

RESPECTFULLY SUBMITTED, this the 5th day of July, 1982.

ROBERT W. GOEHRING
1508 Law & Finance Building
Pittsburgh, Pennsylvania 15219
Solicitor for the Borough of Churchill

No. 81-

In the Supreme Court of the United States

October Term, 1981

CHURCHILL AREA SCHOOL DISTRICT,
Petitioner,

vs.

DOROTHY HOOTS, *et al.*,
Respondents.

BRIEF OF THE BOROUGH OF CHURCHILL, PENNSYLVANIA, APPEARING, AMICUS CURIAE, IN SUPPORT OF PETITIONER'S PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

ROBERT W. GOEHRING
1508 Law & Finance Building
Pittsburgh, Pennsylvania 15219
Solicitor for the Borough of Churchill

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INTEREST OF THE BOROUGH

The Borough of Churchill is a small community east of the City of Pittsburgh in Allegheny County, Pennsylvania. The Borough comprises 2.2 square miles with approximately 4,690 residents. In 1960, the Borough of Churchill lent its name to a formation of Churchill Area School District, which consists of the Borough along with three other neighboring municipalities, to wit, the Boroughs of Forest Hills and Chalfant, and the Township of Wilkins.

The Borough, despite its small size and the fact that it was nearly fully developed, became the situs of the District's high school, two large elementary schools and a special education center for handicapped children. The support of the community and the Borough government for education is amply demonstrated by the placing of so large a proportion of the area's educational facilities within its borders.

Because of the proximity of a large research and development center, a significant proportion of the Borough's residents are technically trained persons, many being foreign born of various nationalities. Together with the other Borough residents, they have encouraged the development of quality education within the Churchill Area School District. In the case at hand, the citizens of Churchill Borough have seen their elected school officials removed and their school system dismantled by a single Federal judge. The Borough files this brief because of the close ties of the municipality to the Churchill Area School District and their joint desire for the continuation of locally controlled quality education. Further, the attempted elimination of locally controlled educational units signifies a dramatic shift in the social policy of this country which is of import to every concerned citizen.

REASONS FOR GRANTING THE WRIT

The gravamen of this case is of national importance—whether a school district such as Churchill, created in a racially

neutral manner, can be dismantled and its duly elected officials dismissed without a finding of segregative intent or interdistrict effect.

The decision of the district court in this case, as affirmed by the circuit court, has held that a violation of the equal protection of the fourteenth amendment occurred solely because State and County officials could have foreseen disparate racial makeups in different reorganized school districts. The application by State and County school officials of racially neutral standards in the reorganization of school districts for purposes of administrative economy, was held by the court below to be discriminatory intent and violative of the equal protection clause. Such an extension of authority is clearly contrary to the standards established by this Court which hold that disparate racial makeup and probable consequences do not establish an equal protection violation. This Court should grant the writ as requested and reverse the findings of the Court below in order to restrain such unsupported expansion.

The court below again erred when it included the Churchill Area School District in the remedy. The record is totally devoid of any evidence that Churchill Area School District acted in a discriminatory manner and, indeed, supports the opposite conclusion. The remedial principles approved by this Court are clear—a lower court is not permitted to realign districts at will solely to produce a result desired by such Court. The clear disregard of this Court's holdings in such a matter amounts to total usurpation of local government control, clearly beyond the decisions of this Court and of a Federal court's remedial power. The granting of certiorari is necessary to preclude such usurpation of power.

I. THE RULING BELOW THAT VARYING RACIAL POPULATIONS OF NEIGHBORING SCHOOL DISTRICTS ESTABLISHES A VIOLATION OF THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT IS CLEARLY ERRONEOUS WITH CONTROLLING DECISIONS OF THIS COURT.

The decisions of this Court have established that the Constitution prohibits only *de jure* segregation, not *de facto* segregation with the finding of *de jure* segregation requiring a segregative condition and a purpose or intent to segregate. *Keyes v. School District No. 1,* 413 U.S. 189, 208 (1973); *Husbands v. Commonwealth,* 395 F. Supp. 1107, 1132 (E.D. Pa. 1975). See *City of Memphis v. Green,* 451 U.S. 100, 101 S.Ct. 1584 (1981); *Arlington Heights v. Metropolitan Housing Corp.,* 429 U.S. 252, 265 (1977).

The case at hand involves no historical segregation. Respondents make no claim of *de jure* school segregation in Pennsylvania prior to the consolidation program. Rather it involves the reorganization of local school districts by the state to produce economies of educational administration. Act 150 under which the reorganizations took place was never challenged by the respondents as segregative state action and therefore its validity must be presumed. Confronted with this situation, the court below proceeded to reason backwards as follows: disparate results equal intent and intent being present, there must be a violation. Such reasoning is constitutionally faulty. This Court has long held that a disparity in racial balance does not show discrimination and there is no obligation to equalize the racial populations among school districts. *Spencer v. Kugler,* 326 F. Supp. 1235 (D. N.J. 1971), *aff'd.,* 404 U.S. 1027 (1972), *Armour v. Nix,* Civil No. 16708 (N.D. Ga. 1979), *aff'd.,* 466 U.S. 930 (1980).

The Court of Appeals recognizing that segregative impact was insufficient without intent proceeded on a selected basis to review the trial court's opinions to accumulate additional items which it believed supported a theory of intent. This Court has defined segregative intent in *Personnel Administrator of Massachusetts v. Feeney,* 442 U.S. 256, 279 (1979), as follows:

> 'Discriminatory purpose', however, implies more than intent as volition or intent as awareness of consequences.... It implies that the decision maker... selected or reaffirmed a particular course of action at least in part "because of," and not merely "in spite of," its adverse effects upon an identifiable group.

The record is devoid of facts that either State or County school officials acted "because of" a desire to adversely effect an identifiable group, i.e. blacks. Indeed, the respondents in their pleadings did not plead or allege any segregative intent and further stipulated that the State and County boards did not consider race in preparing and approving school reorganization plans. Indeed, the action of the boards resulted in smaller racial disparity after reorganization of the General Braddock School District than prior to reorganization. (331a - 335a) (refers to the five-volume Appendix filed by Churchill Area School District in the Court of Appeals). Thus this Court is left solely with the review by the Court of Appeals which attempts to garner evidence by a selected review of the record.

The evidence relied upon reflects only upon the motives of non-party (and often unidentified) individuals. Such testimony by community residents is not sufficient to demonstrate intent of decision-makers. *City of Memphis v. Green,* 451 U.S. 114, n. 23 (1981).

It is important to note at this juncture that the Circuit Court found no evidence of involvement by any Churchill Area School District resident or official in any statement it considered. (A24, 25, 26, 27) (refers to Appendix of Churchill Area School District).

The record is meager at best with regard to intent and purpose. Yet another element must exist to support the actions of the court below—a condition of segregation. *Washington v. Davis,* 426 U.S. 229 (1976); *Keyes,* supra; and *Husbands,* supra. However, it is clear that there is no segregated condition as an intentional result or otherwise from the creation of the General Braddock School District. The record is specific that the net effect was the creation of a district with a non-white enrollment of forty percent (40%) from three districts, two of which had significantly larger non-white populations.

The conclusion that must be drawn is that the lower Court has substituted its judgment for that of the State and County boards as to what constitutes an educationally sound district. Such exercise of power is clearly beyond the decisions of this Court and the scope of a district court's power.

II. THE INCLUSION OF CHURCHILL BY THE COURT BELOW IN AN INTERDISTRICT REMEDY WITHOUT EVIDENCE THAT CHURCHILL ACTED WITH SEGREGATIVE INTENT OR WITHOUT EVIDENCE OF INTERDISTRICT EFFECTS AS TO CHURCHILL IS CONTRARY TO THE RULINGS OF THIS COURT.

This Court has consistently held that absent an interdistrict violation there can be no interdistrict remedy. *Milliken v. Bradley,* 418 U.S. 717 (1974). Federal court decrees exceed appropriate limits if they are imposed upon governmental units that were neither involved in nor affected by the Constitutional violation. *Milliken v. Bradley,* 433 U.S. 267, 282 (1977). The question now before this Court is whether, in the case of Churchill, this Court is prepared to depart from those prior cases.

It is clear that Churchill was not involved in, nor was it the product of, any purposeful segregation. The trial court made this point abundantly clear:

"Churchill is a union school district, created by a referendum of the concerned districts and approved as such by the then State Council on Education on May 29, 1957, and May 17, 1961. It was so considered by the Allegheny County Board plan submitted under Act 299. Therefore, by the terms of Act 150 it was not subject to further reorganization under that Act in 1968. Of more importance in the present case is the fact that Churchill's present boundaries were not created by any actions under Act 150 after 1968 when the alignment of consolidated school districts came into being resulting in the creation of the General Braddock Area School District as a segregated district. Thus no evidence exists of a deliberate, purposeful, segregative intent in the creation of the Churchill district that would subject it to an interdistrict remedy to achieve racial balance." (Memorandum and Order of November 18, 1977, 840a-841a)

With the trial court exonerating Churchill on the one hand and yet including it in an interdistrict remedy on the other, the court below was faced with finding violations by others which created significant segregative effects within Churchill so as to justify its position. The only possible violation was the drawing of the boundaries of General Braddock School District in such a way as to allow a disparate number of blacks, compared to other districts, to remain in that district. The impediment to this position was that Churchill, by reason of Act 150, was not subject to further consolidation and could not have been included. Thus, the court below was again forced to enlarge its reading of the facts, so as to find a violation that began under Acts 561 and 299 as well as Act 150. This was despite the fact that the Amended Complaint alleged General Braddock was formed as a result of violations under Act 150. The above conclusion was reached because the Court erroneously decided that under Act 150 the County [illegible]tate boards had no option other than to merge Braddock, North Braddock and Rankin. The facts support the opposite—Swissvale, Brad-

dock Hills, Turtle Creek, East Pittsburgh and Edgewood could all have been merged in some fashion with the reorganized district of General Braddock.

The case against Churchill lies not on the facts but on the recommendations of experts that it be included in any remedy. Fortunately, like the court, experts are not permitted to provide remedial solutions beyond the scope of the wrong *Milliken v. Bradley I, supra.*

In the case of Churchill, elected officials have been removed and a quality educational program has been dismantled without any finding of discriminatory conduct or of interdistrict effect. Indeed the findings of the district court established that Churchill was not involved in any discriminatory activity and the record discloses no attempt to show interdistrict effect as between Churchill and any other neighboring district. Fairness, as well as the controlling decisions of this Court, demand that an existing school district and its properly elected officials not be discarded without some evidence of an unconstitutional act. The rights of a constitutionally created school district must be constitutionally protected.

CONCLUSION

Because of the national implications of this case as presented in the foregoing Brief and the social consequences pursuant to the elimination of locally controlled school districts, it is respectfully requested that the Court grant the Petition for Issuance of a Writ of Certiorari.

Respectfully submitted,

ROBERT W. GOEHRING
1508 Law & Finance Building
Pittsburgh, Pennsylvania 15219
Solicitor for the Borough of Churchill

PROOF OF SERVICE

I, Robert W. Goehring, Esquire, Solicitor for Churchill Borough, hereby certify that a true and correct copy of the foregoing Brief of Churchill Borough, Amicus Curiae, was served upon all counsel of record by placing same in the United States Mail, postage prepaid, and addressed as follows:

Thomas J. Henderson, Esquire
James S. Liebman, Esquire
10th Floor Allegheny Bldg.
Pittsburgh, PA 15219

J. Robert Maxwell, Esquire
1300 301 Fifth Avenue Bldg.
Pittsburgh, PA 15222

John J. Hickton, Esquire
308 Frick Building
Pittsburgh, PA 15219

J. Frank McKenna, Esquire
2900 Grant Building
Pittsburgh, PA 15219

Thomas M. Rutter, Esquire
324 Frick Building
Pittsburgh, PA 15219

G. N. Evashavik, Esquire
1218 Frick Building
Pittsburgh, PA 15219

Alton Arnold, Esquire
10th Floor Allegheny Bldg.
Pittsburgh, PA 15219

Frank Goodman, Esquire
University of Pennsylvania
School of Law
3400 Chestnut Street
Philadelphia, PA 19104

Thomas A. Gottschalk
Kirkland and Ellis
1776 K Street N.W.
Washington, D.C. 20006

Carl W. Brueck, Jr.
Brueck & Houck
1420 Grant Building
Pittsburgh, PA 15219

Anton Bigman, Esquire
210 Fort Pitt Commons
445 Fort Pitt Boulevard
Pittsburgh, PA 15219

Allen Warshaw, Esquire
Deputy Attorney General
1641 Strawberry Square
Harrisburg, PA 17120

James Duffy, Esquire
1528 Frick Building
Pittsburgh, PA 15219

Phillip B. Kurland, Esquire
Two First National Plaza
Chicago, IL 60603

CHURCHILL BOROUGH

ROBERT W. GOEHRING

Amicus Brief

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No. 81-

In the
Supreme Court of the United States
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CHURCHILL AREA SCHOOL DISTRICT,
Petitioner,

vs.

DOROTHY HOOTS, *ET AL.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MOTION BY AMICUS CURIAE, BOROUGH OF FOREST HILLS, FOR LEAVE TO FILE BRIEF AND BRIEF IN SUPPORT OF THE GRANT OF A WRIT OF CERTIORARI

ARTHUR J. MURPHY, JR.
Solicitor for the Borough
of Forest Hills
JUDITH H. ZERNICH, ESQUIRE
PETER J. TAYLOR, ESQUIRE
ARTHUR J. MURPHY, JR.
& ASSOCIATES
2500 Lawyers Building
Pittsburgh, Pennsylvania 15219

CLYDE G. MILLER, ESQUIRE
2209 Lawyers Building
Pittsburgh, Pennsylvania 15219

Financial Press Corporation, Pittsburgh

No. 81-

In the
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October Term, 1981

CHURCHILL AREA SCHOOL DISTRICT,
Petitioner,

vs.

DOROTHY HOOTS, *ET AL.*,
Respondents.

MOTION FOR LEAVE TO FILE THE ATTACHED BRIEF OF THE BOROUGH OF FOREST HILLS, PENNSYLVANIA APPEARING, AMICUS CURIAE, IN SUPPORT OF PETITIONER'S PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

NOW COMES the Borough of Forest Hills through its solicitor and special counsel and moves this Honorable Court for leave to file its Brief pursuant to Rule 36.4 of the Rules of the Supreme Court of the United States, in support of Petitioner's Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

RESPECTFULLY SUBMITTED, this the 5th day of July, 1982.

ARTHUR J. MURPHY, JR.
Solicitor for the Borough of Forest Hills
JUDITH H. ZERNICH, ESQUIRE
PETER J. TAYLOR, ESQUIRE
ARTHUR J. MURPHY, JR. & ASSOCIATES
2500 Lawyers Building
Pittsburgh, Pennsylvania 15219

CLYDE G. MILLER, ESQUIRE
2209 Lawyers Building
Pittsburgh, Pennsylvania 15219

No. 81-

In the Supreme Court of the United States

October Term, 1981

CHURCHILL AREA SCHOOL DISTRICT,
Petitioner,

vs.

DOROTHY HOOTS, *ET AL.*,
Respondents.

BRIEF OF THE BOROUGH OF FOREST HILLS, PENNSYLVANIA, APPEARING, AMICUS CURIAE, IN SUPPORT OF PETITIONER'S PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

ARTHUR J. MURPHY, JR.
Solicitor for the Borough
of Forest Hills
JUDITH H. ZERNICH, ESQUIRE
PETER J. TAYLOR, ESQUIRE
ARTHUR J. MURPHY, JR.
& ASSOCIATES
2500 Lawyers Building
Pittsburgh, Pennsylvania 15219

CLYDE G. MILLER, ESQUIRE
2209 Lawyers Building
Pittsburgh, Pennsylvania 15219

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INTEREST OF THE BOROUGH

Forest Hills Borough was founded more than 60 years ago. It has a population of approximately 9,000 people occupying approximately 3,000 residential units of all types. It has a commercial district, including strip shopping centers and several large office buildings. One of the first nuclear reactors in the country was constructed by Westinghouse at its research facilities in the Borough.

The municipal government supported by a large group of citizen volunteers has impacted every aspect of life in the community. There are attractive programs and services affecting the cultural, recreational, physical and social well-being of Borough residents. The nonpartisan energetic management of community affairs by the Borough officials, drawn from all walks of life, has made the community a recognized leader among local governments. The school system has been strongly supported by the community. The belief in the necessity of an excellent public school system and a determination to improve it resulted in the merger of the former Forest Hills School District with Churchill, Wilkins Township and Chalfant Borough to form the Churchill Area School District.

The changing economic and social factors confronting communities in the urban ring today has caused many challenges to the maintenance of quality housing stock and vibrant commercial districts. Forest Hills Borough has adjusted to these challenges and continued to maintain a positive community, expanding tax base and quality in the life of its citizens. A substantial part of this ability is the existence of a locally controlled and developed school system.

The Borough citizens feel strongly that they have been deprived of the opportunity to continue this quality of life and maintenance of their own superior school system because of the District Court decision based upon factors and actions outside of the Borough and its School District. The citizens feel

strongly that it is unfair to substantially and permanently disrupt the community well-being because of conduct not the fault of the Borough citizens or its government.

Forest Hills Borough and its municipal officials file this Brief because of the strong dependency of the community upon the quality of its public school system as an integral pillar of community welfare and the strong sense of loss voiced by its citizens as a result of this decision.

REASONS FOR GRANTING THE WRIT

This case presents important and far reaching issues of federal constitutional law regarding interdistrict remedies in school desegregation cases. The lower court has decided these issues in conflict with controlling decisions of this Court. The District Court has implicated Churchill School District, previously autonomous, in an interdistrict consolidation absent a finding of a causal link between constitutional violations and a significant, interdistrict segregative effect. Such a blatant abrogation of local autonomy is without precedent and has national implications.

The facts demonstrate that Churchill's involvement in the remedy is for other than racial reasons. If local school districts may be dissolved and dismantled without regard to the educational quality of the existing district and solely to give economic viability to geographically contiguous districts, there is a total usurpation of local government control.

The decisions of the District Court sanctioned by the Third Circuit are in conflict with this Court's decision in *Milliken v. Bradley*, 418 U.S. 717 (1974) and are without precedent. The issues decided are of national importance and without this Court's authoritative settlement of these issues, all local school districts will remain uncertain of their continued viability.

I. THE INCLUSION OF CHURCHILL SCHOOL DISTRICT BY THE COURTS BELOW IN AN INTERDISTRICT CONSOLIDATION WAS CLEARLY ERRONEOUS SINCE IT WAS DONE WITHOUT EVIDENCE THAT CHURCHILL ACTED WITH SEGREGATIVE INTENT AND WITHOUT EVIDENCE OF SEGREGATIVE EFFECT IN ANOTHER DISTRICT.

In the instant case, the District Court held that Churchill District had engaged in purposeful, intentional discrimination but that even absent an active participation by Churchill in the creation of General Braddock Area School District, its inclusion in the New District was justified under the standards set forth in *Milliken v. Bradley*, 418 U.S. 717 (1974). It is the position of Churchill that the Court's finding of de jure segregation by Churchill is clearly erroneous and that the interdistrict remedy was not authorized given the historical background of Churchill's participation in this case.

In the instant case, the District Court predicated its finding of de jure segregation by all of the districts, including Churchill, solely on the basis of a higher proportion of minority students in the General Braddock Area School District. However, under the decisions of this Court, racial imbalance does not constitute per se a constitutional violation. *Milliken v. Bradley, supra,* at 741, n. 19. Proof of a racially discriminatory intent or purpose is required to show an Equal Protection violation. *Dayton Board of Education v. Brinkman,* 433 U.S. 406 (1977). A finding of de jure segregation requires a showing of (1) action or inaction by public officials (2) with a segregated purpose (3) which actually results in increased or continued segregation in the public schools. *Oliver v. Michigan State Board of Education,* 508 F.2d 178, 182 (6th Cir. 1974).

The starting point for analyzing the existence of an Equal Protection violation is the decision of *Village of Arlington*

Heights v. Metropolitan Housing Development Corporation, 429 U.S. 252 (1977) [hereinafter "Arlington Heights"]. In that case, the Court found in the context of alleged housing discrimination that something more than disproportionate impact must be shown.

> "[Washington v.] Davis [426 U.S. 229 (1976)] does not require a plaintiff to prove that the challenged action rested solely on racially discriminatory purposes. Rarely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the 'dominant' or 'primary' one. In fact, it is because legislators and administrators are properly concerned with balancing numerous competing considerations that courts refrain from reviewing the merits of their decisions, absent a showing of arbitrariness or irrationality. But racial discrimination is not just another competing consideration. When there is a proof that a discriminatory purpose has been a motivating factor in the decision, this judicial deference is no long justified.
>
> "Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available. The impact of the official action—whether it 'bears more heavily on one race than another,' . . .—may provide an important starting point. Sometimes a clear pattern, unexplainable on the grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face. . . . The evidentiary inquiry is then relatively easy. But such cases are rare. Absent a pattern as stark as that in *Gomillion* or *Yick Wo,* impact only is not determinative, and the court must look to other evidence." 429 U.S. at 265 (Citations omitted.)

While there are some instances in which the disproportionate impact is so "dramatic" as to compel a finding of

discriminatory intent, impact alone is rarely sufficient. The Court in *Arlington Heights* therefore set forth five "evidentiary sources" to be considered in establishing discriminatory purpose:

(1) Discriminatory impact
(2) Historical background of decision
(3) Sequence of events leading up to decision
(4) Departure from normal procedural sequence
(5) Departure from normal substantive criteria.

These evidentiary sources were elaborated by the Court in *Columbus Board of Education v. Penick,* 443 U.S. 449 (1979) in the context of school desegregation. The Court examined alleged continued segregation in the public schools following the decision of *Brown v. Board of Education,* 349 U.S. 294 (1954) and stated as follows:

> "It is understood that to prevail the plaintiffs were required to 'prove not only that segregated schooling exists but also that it was brought about or maintained by intentional state action,'. . .—that is, that the school officials had 'intended to segregate.' . . . The District Court also recognized that under those cases disparate impact and forseeable consequences, without more, do not establish a constitutional violation. . . . Nevertheless, the District Court correctly noted that actions having foreseeable and anticipated disparate impact are relevant evidence to prove the ultimate fact, forbidden purpose. Those cases do not forbid 'the foreseeable effects standard from being utilized as one of the several kinds of proofs from which an inference of segregative intent may be properly drawn.' . . . Adherence to a particular policy or practice, 'with full knowledge of the predictable effects of such adherence on racial imbalance in a school system is one factor among many others which may be considered by a court in determining whether an inference of segregative intent should be drawn.' " 443 U.S. at 464-65.

While proof of foreseeable consequence is one type of relevant evidence of racially discriminatory purpose, it does not make out a prima facie case of intentional discrimination. See *Dayton Board of Education v. Brinkman*, 443 U.S. 526, 536, n. 9 (1979). *Columbus Board of Education v. Penick, supra,* was decided against a background of a concededly segregated school system and a factual determination that the segregation was created in part by prior intentionally segregative acts. For example, the Board had a prior general practice of assigning black teachers only to those schools with substantial black student populations; created optional attendance zones; and it selected sites for new school construction that would maintain racial separation.

In the instant case the District Court assumed disproportionate impact solely on the basis of racial imbalance. From that the Court groped to establish facts which, in conjunction with the assumed disproportionate impact, would establish an actual segregative purpose on the part of Churchill's public officials. However, the Court found as a matter of law that Acts 299 and 150 prohibited considerations of race and further that the officials refused to invoke race as a basis for classification. *Hoots* II, 359 F.Supp. at 823. These findings hardly comport with a finding of de jure segregation.

In addition the important teachings of *Milliken v. Bradley, supra,* so often repeated in this litigation, must be borne in mind: Absent an interdistrict violation, there can be no interdistrict remedy. This Court will not hesitate to strike down a federal court decree if it is imposed upon governmental units that were not involved in or affected by the constitutional violation. *Milliken* requires a causal connection between a constitutional violation and a significant interdistrict segregative effect.

Viewing first the five part test of *Arlington Heights, supra,* the record in the instant case establishes the following: the

General Braddock Area School District was formed pursuant to Act of July 8, 1968, P.L. 299, No. 150, 24 P.S. § 2400.1, et seq. ("Act 150"). This formal reorganization occurred on July 1, 1971, long after the Churchill Area School District was formed pursuant to Act of August 8, 1963, P.L. 564, No. 299, 24 P.S. § 2-290, et seq. ("Act 299"). All parties concede that Act 150 excluded from the consolidation process those districts which had already been established under Act 299. The validity of Act 150 has never been challenged. Thus, to say that the state and county boards endorsed racially segregative intent in effecting consolidation under Act 150 is to defy logic and common sense: state officials had *no choice* but to exclude Churchill from any plan for consolidation under Act 150. Since the 1971 reorganization did not, *could not,* in any way implicate or include Churchill, Churchill cannot be part of the remedy. *Milliken.* Thus there was no departure from normal procedures or normal substantive criteria. *Arlington Heights.*

The Third Circuit and the District Court conceded the validity of this argument and apparently recognized that, insofar as the formation of General Braddock School District in 1971 is concerned, there was no segregative intent. In *Milliken v. Bradley, supra,* the Supreme Court reviewed an Order mandating interdistrict consolidation. This Order of the lower court was made in the absence of a finding of de jure segregation in any of the suburban school districts since no intradistrict plan could effectively desegregate the Detroit system. Recognizing that school district lines are not sacrosanct, the *Milliken* Court set forth the standards for an interdistrict remedial order as follows:

> "The controlling principle consistently expounded in our holdings is that the scope of the remedy is determined by the nature and extent of the constitutional violation. . . . Before the boundaries of separate and autonomous school districts may be set aside by consolidating the separate units for remedial purposes or by imposing a

> cross-district remedy, it must first be shown that there has been a constitutional violation within one district that produces a significant segregative effect in another district. Specifically, it must be shown that racially discriminatory acts of state or local school districts, or of a single school district have been a substantial cause of interdistrict segregation. Thus an interdistrict remedy might be in order where the racially discriminatory acts of one or more school districts caused racial segregation in an adjacent district, or where district lines have been deliberately drawn on the basis of race. In such circumstances an interdistrict remedy would be appropriate to eliminate the interdistrict segregation directly caused by the constitutional violation. Conversely, without an interdistrict violation and interdistrict effect, there is no constitutional wrong calling for an interdistrict remedy." 418 U.S. at 744-45.

In *Milliken* the Court found that absent evidence that the suburban school districts had participated in the creation of the Detroit system, they could not be required to participate in desegregating schools in Detroit. In making this decision the Court emphasized the importance of local autonomy of school districts and the inability of the federal courts to deal with problems of management and administration of an interdistrict school system.

While the District Court in the instant case found evidence of racial imbalance within the various autonomous school districts, this alone is not sufficient to establish a per se constitutional violation. *Milliken, supra,* at 741 n. 19. The District Court, however, despite this glaring violation of the *Milliken* test, nonetheless found that Churchill should be included in the multi-district remedy. The Court found that the violation occurred "pursuant to the entire reorganization process that began with Act 561." 510 F.Supp. at 621. The simple fact is that there was no evidence to support this conclusion. Nor was the Third Circuit apparently able to find any factual support in the

record to sustain this sweeping statement. The District Court stated that the elimination of Churchill from consideration for merger with Braddock caused Braddock to be "in an isolated position." *Id.* However, it is clear that many school districts, along with Churchill, were not merged with Braddock prior to Act 150. All these districts, except Churchill, remained viable alternatives under Act 150 in 1971, yet were not merged. Thus, Braddock was not in an "isolated position" without viable mergable partners: Turtle Creek, Edgewood, and Swissvale, for example, were still available under Act 150. Moreover, the Amended Complaint of plaintiffs in this action specifically states that General Braddock Area School District was formed as a result of violation of Act 150. For the Court to concede that there was no per se violation of Act 150 as to Churchill, and then reach back to prior legislation over seven years earlier to find a violation is to decide important constitutional questions not properly before it. It is clear that the District Court was reaching to find some justification for including Churchill when in fact none exists. The Third Circuit, too, was unable to find any further justification for including Churchill in the remedy. Slip Opinion at 30. By merely quoting Judge Weber's opinion at 510 F.Supp. at 621, the Court did no more than affirm a finding lacking in factual support.

Indeed there would seem to be no more definitive source for the lack of segregative intent in Churchill than the District Court itself. In its memorandum and Order dated November 18, 1977, the Court observed:

> "Churchill is a union school district created by a referendum of the concerned districts and approved as such by the then State Council on Education on May 29, 1957 and May 17, 1961. It was so considered by the Allegheny County Board plan submitted under Act 299. Therefore, by the terms of Act 150 it was not subject to further reorganization under that Act in 1968. Of more importance in the present case is the fact that Churchill's present

> boundaries were not created by any actions under Act 150 after 1968 when the alignment of consolidated school districts came into being resulting in the creation of General Braddock Area School District as a segregated district. *Thus, no evidence exists of a deliberate, purposeful, segregative intent in the creation of the Churchill District that would subject it to an interdistrict remedy to achieve racial balance.* (Memorandum and Order of November 18, 1977, emphasis added.)"

It would appear that no clearer, definite statement of Churchill's noninvolvement with an alleged constitutional violation in the General Braddock Area School District formation is needed. Yet, despite this statement, the Court, less than three and a half years later, *did* include Churchill in an interdistrict remedy. The District Court never resolved this inconsistency in its findings. The Third Circuit read this curious statement as indicating only that the formation of Churchill under Act 299 was not racially motivated. The Court stated that this still did not answer the question "whether [Churchill's] failure to be included in a still larger district along with GBASD was due to racial considerations." Slip Opinion at footnote 14. Thus, we return to the original question of whether the failure to include Churchill in the 1971 reorganization was motivated along racial lines. It clearly was not, as we have discussed: Churchill was *barred*, under state law, from being included; there were no racial considerations. Nor was the prior failure to include Churchill a constitutional violation, as we have shown.

In sum, the lower courts have found that Churchill was in no way implicated, by virtue of state law, in the formation of General Area Braddock School District in 1971. The *only* basis for including Churchill in an interdistrict remedy has been traced to the reorganization process beginning with Act 561. However, the District Court found that that, too, was not pursued along racial lines. Further, the record belies the finding that the reorganization prior to Act 150 left General Brad-

dock "in an isolated, position." Since there is no segregative intent and the formation of Churchill did not produce a significant segregative effect, Churchill cannot be part of an interdistrict remedy under the standards of *Milliken.*

II. CHURCHILL WAS INCLUDED IN THE MULTI-DISTRICT REMEDY, NOT BECAUSE IT WAS GUILTY OF A CONSTITUTIONAL VIOLATION, BUT BECAUSE OF THE NEW DISTRICT'S NEED FOR FINANCIAL STABILITY.

The Third Circuit, relying on Opinions of this Court has observed:

> "A court is not at liberty to issue orders merely because it believes that they will produce a result which the court finds desirable. The existence of a constitutional violation does not authorize a court to seek to bring about conditions that never would have existed even if there had been no constitutional violation. The remedy for a constitutional violation may not be designed to eliminate arguably undersirable states of affairs caused by purely private conduct (de facto segregation) or by state conduct which has in it no element of racial discrimination.... Nor may a remedial desegregation order require 'as a matter of substantive constitutional right, any particular degree of racial balance or mixture.'
>
> "The task of a remedial decree in a school desegregation case is simply to correct the constitutional violation and to eradicate its effects. 'As with any equity case the nature of the violation determines the scope of the remedy.' "

Evans v. Buchanan, 582 F.2d 750, 757-8 (3rd. Cir. 1978).

It is clear that Churchill has been included in this remedy solely to conform to the District Court's perception of a geographically, economically and demographically well rounded school district. Indeed, the Court expressed its reasons for the

inclusion of Churchill. See Third Circuit Opinion at footnote 15 (3). The District Court's final statement in support of Churchill's inclusion is instructive: "[Churchill's] economic strength would add financial stability to the new district."

It is respectfully suggested that Churchill's economic stability is the prime reason for its inclusion. Its excellent facilities, surplus budget, large tax base, and overall fiscal strength are indeed envied by surrounding districts, including the depressed areas within General Braddock Area School District. Such areas may make great use of Churchill's financial resources in shoring up delapidated buildings, outdated programs, outmoded facilities and the general deteriorating condition of the educational community. Yet the economic viability of contiguous school districts has never been considered a legitimate reason for discarding and redrawing district lines. It is clear then that control of the local government unit has been usurped by the courts, and that this Court must reverse the judgment below.

CONCLUSION

We would thus urge this Court to grant the Writ of Certiorari requested by Petitioners. This action is required to reverse the lower Court's approval of a multi-district remedy including Churchill where there is lacking segregative intent and where Churchill was not involved in the reorganization at issue. Further, the Court must consider on the merits the true reason for the inclusion of Churchill in this remedy, and the lack of any proper basis therefor.

Respectfully submitted this 5th day of July, 1982.

ARTHUR J. MURPHY, JR.
Solicitor for the Borough
of Forest Hills
JUDITH H. ZERNICH, ESQUIRE
PETER J. TAYLOR, ESQUIRE
ARTHUR J. MURPHY, JR.
& ASSOCIATES
2500 Lawyers Building
Pittsburgh, Pennsylvania 15219

CLYDE G. MILLER, ESQUIRE
2209 Lawyers Building
Pittsburgh, Pennsylvania 15219

PROOF OF SERVICE

I, Arthur J. Murphy, Jr., Esquire, Counsel for Forest Hills Borough, hereby certify that a true and correct copy of the foregoing Brief of Forest Hills Borough, Amicus Curiae, was served upon all counsel of record by placing same in the United States Mail, postage prepaid, and addressed as follows:

Thomas J. Henderson, Esquire
James S. Liebman, Esquire
10th Floor Allegheny Bldg.
Pittsburgh, PA 15219

J. Robert Maxwell, Esquire
1300 301 Fifth Avenue Bldg.
Pittsburgh, PA 15222

John J. Hickton, Esquire
308 Frick Building
Pittsburgh, PA 15219

J. Frank McKenna, Esquire
2900 Grant Building
Pittsburgh, PA 15219

Thomas M. Rutter, Esquire
324 Frick Building
Pittsburgh, PA 15219

G. N. Evashavik, Esquire
1218 Frick Building
Pittsburgh, PA 15219

Alton Arnold, Esquire
10th Floor Allegheny Bldg.
Pittsburgh, PA 15219

Frank Goodman, Esquire
University of Pennsylvania
School of Law
3400 Chestnut Street
Philadelphia, PA 19104

Thomas A. Gottschalk
Kirkland and Ellis
1776 K Street N.W.
Washington, D.C. 20006

Carl W. Brueck, Jr.
Brueck & Houck
1420 Grant Building
Pittsburgh, PA 15219

Anton Bigman, Esquire
210 Fort Pitt Commons
445 Fort Pitt Boulevard
Pittsburgh, PA 15219

Allen Warshaw, Esquire
Deputy Attorney General
1641 Strawberry Square
Harrisburg, PA 17120

James Duffy, Esquire
1528 Frick Building
Pittsburgh, PA 15219

Phillip B. Kurland, Esquire
Two First National Plaza
Chicago, IL 60603

FOREST HILLS BOROUGH

ARTHUR J. MURPHY, JR.

Amicus Brief

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No.

In the Supreme Court of the United States

, Term

CHURCHILL AREA SCHOOL DISTRICT,
Petitioner

vs.

DOROTHY HOOTS, et al.,
Respondents

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

MOTION BY AMICUS CURIAE, PENNSYLVANIA SCHOOL BOARDS ASSOCIATION, FOR LEAVE TO FILE BRIEFS AND BRIEF IN SUPPORT OF THE GRANT OF A WRIT OF CERTIORARI

WILLIAM FEAREN,
MICHAEL I. LEVIN,
CLECKNER AND FEAREN
Counsel for Pennsylvania School Boards Association

31 North Second Street
Harrisburg, Pa. 17101
(717) 238-1731

Murrelle Printing Co., Box 100, Sayre, Pa. 18840—(717) 888-2244

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Respondents

On Petition for Certiorari to the United States Court of Appeals for the Third Circuit

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MOTION BY AMICUS CURIAE, PENNSYLVANIA SCHOOL BOARDS ASSOCIATION, FOR LEAVE TO FILE BRIEFS

Pursuant to Rule 36 of the Rules of the Supreme Court of the United States, Amicus Curiae, the Pennsylvania School Boards Association, moves this Court for permission to file briefs in support of the Petition of Certiorari filed in the above captioned matter, and in support thereof, alleges the following:

1. Your movant, the Pennsylvania School Boards Association, Amicus Curiae, is a non-profit corporation of the Commonwealth of Pennsylvania, with its offices

located at 412 North Second Street, Harrisburg, Pennsylvania, 17101. Your movant has as its function the rendering of services to the local school boards of the Commonwealth of Pennsylvania and to the individual members of said school boards for the purpose of improving education in the Commonwealth of Pennsylvania. Its request for permission to file briefs in support of the Petition for the issuance of a Writ of Certiorari in this matter, is another effort to fulfill its stated objectives.

2. The movant has a state and community wide reputation for thorough and objective research in the field of education in the Commonwealth of Pennsylvania. Counsel for your movant has filed briefs with your Honorable Court as counsel for the Pennsylvania School Boards Association, Amicus Curiae, in other matters of fundamental concern to public education in the Commonwealth of Pennsylvania. The filing of a brief by the Amicus Curiae is necessitated because the question to be decided at bar is of nationwide importance to public education and in some respects is of first impression, thereby necessitating the presentation of a wide range of viewpoints.

3. Attached hereto is the brief sought to be filed in this matter.

4. All parties, through their respective counsel, have been advised of the intended filing of this motion. The Respondents and the General Braddock Area School District were the only parties to refuse to consent to the filing of the brief by your movant. Copies of the written consents of the parties that did consent have been filed, concurrently herewith, with the Clerk of the Court.

Motion

WHEREFORE, your movant prays that it be allowed to file briefs, amicus curiae, in this matter.

CLECKNER AND FEAREN

BY MICHAEL I. LEVIN,
31 North Second Street
Harrisburg, Pa. 17101
Counsel for Amicus Curiae, Pennsylvania School Boards Association

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IN THE SUPREME COURT OF THE UNITED STATES

CHURCHILL AREA SCHOOL DISTRICT,
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On Petition for Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF FOR AMICUS CURIAE, PENNSYLVANIA SCHOOL BOARDS ASSOCIATION, IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

INTEREST OF THE AMICUS CURIAE

The Pennsylvania School Boards Association is a voluntary association composed of the five hundred and one (501) local school districts of the Commonwealth of Pennsylvania and the members of the school boards of those districts. The Pennsylvania School Boards Association was organized in 1895 and is the first such association in the nation and has as its function the rendering

Interest of Amicus Curiae

of assistance to local school districts and the representation of the general public interest in the field of public education.

The instant matter is of fundamental concern to the Pennsylvania School Boards Association as it involves the circumstances under which the Federal Judiciary can intervene in the affairs of local school districts and the degree of such intervention.

STATEMENT OF CASE

This case arose following the creation of the General Braddock Area School District (hereinafter referred to as "General Braddock") in 1971 pursuant to Act 150 of 1968, Act of July 8, 1968, P.L. 299, 24 P.S. §2400.1 *et seq*. The school district serves an area embracing the boroughs of Braddock, North Braddock and Rankin, all of which had been separate independent school districts prior to their reorganization. The creation of General Braddock was proposed and the reorganization adopted by the County Board on October 7, 1968, pursuant to Act 150 and was approved by the State Board on May 9, 1969. The parties stipulated that in preparing and approving the plan, neither the State Board nor the County Board took race into account. The parties further stipulated that neither the State Board nor the County Board took race into account because each construed the State's statutes of approval of administrative units as prohibiting consideration of race. Accordingly, the lower court made no findings that the creation of General Braddock was the result or product of intention or purposeful segregation

With respect to the other school districts involved in this action, there were never any allegations or findings of segregation in their creation. The lower court has limited their involvement in this matter, allowing them to be heard for remedial purposes only and denying them the opportunity to defend against the charges of segregation.[1]

---

[1] It must be noted that the individual school districts that were abolished were never actually "sued" or participated in this

Statement of Case

When General Braddock was created, it had a total non-white population of approximately forty percent (40%). That percentage resulted from the merger of the three (3) aforementioned school districts that themselves had non-white percentages of approximately seventy-one percent (71%) for Braddock, fifty-one percent (51%) for Rankin and twenty percent (20%) for North Braddock. Therefore, while neither the State nor the County Boards considered race, the creation of General Braddock served to better balance the non-white populations throughout the area.

It is noteworthy that in a decision of District Judge Weber of November 18, 1977 (relating to the denial of

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action until well after the District Court's 1973 decision finding unconstitutional segregation. The individual school districts, themselves, were not charged by the plaintiffs with segregation and they never had the proper opportunity to defend the liability aspects of this case. Indeed, attempts by the Churchill, Edgewood, Swissvale and Turtle Creek School Districts to be given an opportunity to defend the liability aspect of this case were consistently rejected by the lower courts. *See, Hoots vs. Commonwealth of Pennsylvania*, 495 F.2d 1095 (3d Cir.), *cert. denied*, 419 U.S. 884 (1974). The lower courts made much ado about the fact that the Attorney General of the Commonwealth sent letters to the surrounding districts informing them of the action and urging them to intervene. *See*, 359 F.Supp. at 822. However, this nation's jurisprudence and due process concepts do not recognize process by invitation. There is significant difference between being properly sued with proper allegations contained in a proper complaint properly served and an invitation to jump into a veritable lion's den. In this case, the bottom line is that five school districts were abolished, their locally elected officials were removed from office and a new school district was created on the basis of liability which the abolished school districts were not properly permitted to contest.

approval of a remedial plan) *see, Hoots vs. Commonwealth,* 587 F.2d 1340 (3d. Cir. 1978), it was specifically found that there was no evidence that "General Braddock School District practices or allows segregation in the administration of its school system". It was further found that there was no evidence to support any allegation of an inferior educational system in the General Braddock Area School District. Therefore, the record illustrates that in 1971 the Defendant State and County Boards created a school district that was less than fifty percent (50%) non-white and that practiced no segregation within itself and which provided an acceptable educational program.

REASONS FOR GRANTING THE WRIT

The Court of Appeals below has decided an important question of federal law in conflict with applicable decisions of your Honorable Court. In conflict with your Honorable Court's decisions in *Keyes vs. School District No. 1, Denver Colorado,* 413 U.S. 189 (1973), and its progeny, the court below essentially (1) did away with the need for proof of intentional or purposeful segregation in establishing a constitutional violation, (2) dispensed with the need of a segregated condition in establishing a claim of unconstitutional segregation and (3) allowed reorganization of school districts without regard to the nature and extent of the perceived constitutional violation.

Your Honorable Court has held on numerous occasions that intentional or purposeful segregation or discrimination is a prerequisite to establishing a constitutional violation. *City of Memphis vs. Green,* U.S. , 49 L.W. 4389 (April 20, 1981) (closing of streets); *Washington vs. Davis,* 426 U.S. 229 (1976) (employment); *Village of Arlington Heights vs. Metropolitan Housing Development Corporation,* 429 U.S. 252 (1977) (housing); *City of Mobile, Alabama vs. Bolden,* 446 U.S. 55 (1980) (voting). In *City of Memphis, supra,* the Court said: "the absence of proof of discriminatory intent forecloses any claim that the official action challenged . . . violates the Equal Protection Clause of the Fourteenth Amendment." 49 L.W. at 4394.

In keeping with the proposition that segregative intent is a prerequisite to a finding of a constitutional viola-

tion, the Court has categorically stated that racially disproportionate impact of state action will not render such action unconstitutional. In *Davis, supra,* the Court stated that "we have not held that a law, neutral on its face and serving ends otherwise within the power of government to pursue, is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than another." 426 U.S. at 242. Similarly, in *Columbus Board of Education vs. Penick,* 443 U.S. 449 (1979), the Court said: "disparate impact and foreseeable consequences, without more, do not establish a constitutional violation . . . ." *Id.* at 464. Consistently, the Court in *Penick, supra,* specifically rejected the holdings of those Circuit Courts that held proof of discriminatory purpose is unnecessary where disparate racial impact is shown. 426 U.S. 244-245. *See also, Personnel Administrator of Massachusetts vs. Feeney,* 442 U.S. 256 (1979); *Resident Advisory Board vs. Rizzo,* 564 F.2d 126 (3d Cir. 1977); *Johnson vs. San Francisco Unified School District,* 500 F.2d 349 (9th Cir. 1974); *Nevett vs. Sides,* 571 F.2d 209 (5th Cir. 1978); *United States vs. Board of School Commissioners of the City of Indianapolis, Indiana,* 637 F.2d 1101 (7th Cir. 1980), *cert. denied,* 101 S.Ct. 114 (1980).

At bar, there was no proof nor finding of segregative intent or purpose. Indeed, the parties stipulated that race was not taken into consideration, consistent with statute and policy, in the formation of the General Braddock Area School District and the lower court based its finding of a constitutional violation solely upon the fact that the "natural, forceseeable and actual effects of combining Braddock, North Braddock and Rankin into a single

district was to perpetuate, exacerbate and maximize segregation of school pupils." 359 F.Supp. at 323.[2] Plainly, the District Court applied and the Circuit Court affirmed an incorrect standard.[3]

As was stated by District Judge Newcomer in his analysis of the District Court's decision:

> "*Hoots* dealt, as does our case, with a county school reorganization under Act 150, and found a constitutional violation based on the 'foreseeable consequences' test quoted above.
>
> *Hoots*, however, was decided before the Supreme Court's decision in *Keyes*, and we respectfully

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[2] Although District Judge Weber based his conclusions on disparate impact, in his finding of fact he found that the State and County Boards' disregard of a race was evidence of racial segregation (R. 767a-768a). Such a proposition is totally novel, unprecedented and, more importantly, contrary to Supreme Court decisions requiring proof of purpose or intent to segregate. Certainly, a finding that one disregarded race, was blind to race if you will, is incompatible with a finding that that person took action on the basis of race.

[3] The Circuit Court, in addressing the contention that the District applied the wrong legal standard conceded that the District Court did not couch its decision in the language of *Keyes*, *supra*, but that it did employ the proper standard and that there was sufficient proof to support a finding of purposeful segregation. We disagree. A fair reading of the District Court's decision of 1973, 359 F.Supp. at 807, illustrates that it was based on the concept of disparate results and the acceptance of the fact that the State Board, in creating the district, did not take race into account, as stipulated by the parties. *See*, 359 F.Supp. at 823. Conclusions of Law, 4, 5, 6, 7, and 9. There is simply no finding, factual or legal, by the District Court that the Defendants engaged in purposeful segregation.

suggest that, after *Keyes, Hoots* no longer constitutes the correct rule . . . ." *Husbands vs. Commonwealth,* 395 F.Supp. 1107 (E.D. Pa. 1975).[4]

Therefore, it is clear that the lower courts misapplied decisions of your Honorable Court.

Through this point, we have dealt with the concept of intent and purpose. But a second element that must exist to support the actions of the lower courts is a finding of a condition of segregation. *Washington vs. Davis, supra; Keyes, supra;* and *Husbands, supra.* In other words, there must actually be a separation of the races, a dual system. But, it is clear that there was no segregated condition resulting intentionally or otherwise from the creation of General Braddock.

General Braddock resulted from the consolidation of three (3) school districts, which had non-white enrollments at the time of consolidation of approximately seventy-one percent (71%), fifty-one percent (51%), and twenty percent (20%). The net effect was the creation of a school district approximately forty percent (40%)

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[4] In a very real sense, the lower court concluded that there was unconstitutional segregation because a better racial balance could have been achieved (R. 768a). However, racial imbalance alone does not constitute a constitutional violation, *Milliken vs. Bradley,* 418 U.S. 717, 741, n. 19 (1974), and cannot be inferred simply because a better racial mix may be achievable. *Swann vs. Charlotte-Mecklenburg Board of Education,* 402 U.S. 1 (1971); *Akins vs. Texas,* 325 U.S. 398 (1945). Indeed, at bar, *absolutely no evidence is in the record that a better racial mix would have been practical, feasible or beneficial!* Therefore, the lower court simply erred in basing a finding of unconstitutional segregation, at least in part, upon the notion that better racial balance could have been achieved.

non-white. There was no segregation within the three (3) component school districts before the consolidation and none afterwards. General Braddock itself was an integrated district with a less than fifty percent (50%) minority enrollment. Under such facts, it is difficult to conceive how a state of segregation could be found to exist.

We have been unable to find any cases which indicated that a certain minority percentage is required to prove the existence of a segregated school district. On the contrary, those courts that have considered the matter have generally concluded that there is no "magic" figure and that, in addition to minority enrollment, other factors are relevant. It was said by the court in *Keyes, supra,* for example, that:

> "What is or is not a segregated school district will necessarily depend on the facts of each particular case. In addition to the racial and ethnic composition of a school student body, other factors, such as the racial and ethnic composition of faculty and staff in the community and administration attitudes toward the school must be taken into consideration." 413 U.S. at 196.

However, we were similarly unable to find any cases which have held that a segregative condition existed where there was a minority percentage of less than fifty percent (50%). In fact, some states that affirmatively attempt to achieve racial balance have placed the cut-off at fifty percent (50%). *See, Uniontown Area School District,* 455 Pa. 52, 313 A.2d 156 (1973). In a report issued by the United States Commission on Civil Rights of 1967, it was concluded that it was only where schools "have a majority negro enrollment that people regard the schools

as segregated and inferior." I U.S. Commission on Civil Rights, Racial Isolation in the Public Schools, 209-210 (1967). In a law review article authored by District Judge J. Skelly Wright, it was stated that: "a school, though mathematically racially imbalanced as compared with other schools in the area, ordinarily would not be racially segregated in the constitutional sense unless the negro population of the school outnumbered the white." Wright, Public School Desegregation: Legal Remedies for De Facto Segregation, 16 Western Reserve L.R., 478, 495 (1965). Furthermore, at least one court has rejected a definition of segregation where there would be less than fifty percent (50%) minority enrollment. *Bell vs. School City of Gary, Indiana*, 213 F. Supp. 819 (N.D. Ind.), 324 F.2d 209 (7th Cir. 1963), *cert. denied*, 377 U.S. 924 (1964). Therefore, it appears that there is a judicially accepted recognition that, at the least, majority minority enrollment is necessary to conclude that a segregated condition exists.

The dictionary definition of segregation is:

> "The act or process of segregating: the state of being segregated 2a: the separation or isolation of a race, class or ethnic group by enforced or voluntary residence in a restricted area, by barriers to social intercourse, by separate educational facilities, or by other discriminatory means b: the separation for special treatment or observation of individuals or items from a large group." Webster's New Collegiate Dictionary (1980), p. 1039.

At bar, there was no separation of the races. A school district was created in 1971 where whites and non-

whites could and did attend school togeth in an integrated program. Although the proportion of non-whites to whites may have been greater in General Braddock than in some surrounding districts[5], when General Braddock was created, its non-white enrollment was only approximately forty percent (40%). That forty percent (40%) attended school, not separate from, but with the approximately sixty percent (60%) white enrollment. The non-white enrollment of General Braddock was not identified for special treatment and received an education of no lesser quality than did the majority white enrollment that also attended school in the district.

It is submitted that where a state creates a school district that has a minority of non-whites and where there is no charge or showing of segregation within the district, a segregated condition has not been created which can justify interference by the federal courts.

Lastly, assuming, *arguendo*, that the creation of General Braddock was the product of purposeful segregation and that a segregated condition existed, the question becomes whether the remedy imposed by the district court is legally proper. The Pennsylvania School Boards Association submits that it is not and that it is not consistent with the landmark decision of your Honorable Court in *Milliken vs. Bradley*, 418 U.S. 717 (1974). In that case, the court said that "the scope of the remedy is determined

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[5] There were other school districts in Allegheny County, such as the Pittsburgh School District, that had higher proportionate minority enrollment. As the Court noted in its decision of March 5, 1981, "the school population in some nearby districts approaches the degree of minority concentration existing in General Braddock . . . ." (R. 868a)

by the nature and extent of the constitutional violation." The court looked askance at any remedy which would destroy political sub-divisions in a state and create new ones. In criticizing a lower court decision that did just that, your Honorable Court condemned such legislative actions by courts. At bar, however, the district court, improperly assumed the legislative role against which your Honorable Court cautioned. Far from simply erasing boundary lines for the rather limited purpose of achieving better racial balance, which is the sole end being sought by the lower courts here, the lower courts are disenfranchising elected officials who have not been found to have been involved either directly or indirectly in the supposed segregation. The lower court is ignoring Pennsylvania constitutional and legislative mandates and is creating elected offices and voting districts without any charge or showing that Pennsylvania's representative system contributed in any manner to any alleged constitutional violation. The remedy imposed by the lower court is analogous to a court disenfranchising a school board by establishing an entirely new and different school district organization where the only violation that was found was the creation of two or three segregated schools within one school district where no evidence existed that the school district's organization or governing structure was involved in the unlawful segregation. Just as segregation could be eliminated in this example without destroying the entire system, the perceived segregation at bar could be eliminated without destroying General Braddock and the surrounding districts. It is thus clear that the remedy imposed by the lower court does not coincide with the nature and extent of the supposed constitutional violation.

CONCLUSION

In view of the foregoing, it is respectfully requested that the Court grant the Petition for the Issuance of a Writ of Certiorari.

Respectfully submitted,

CLECKNER AND FEAREN

BY WILLIAM FEAREN,

BY MICHAEL I. LEVIN,

Counsel for Amicus Curiae, Pennsylvania School Boards Association

Opposition

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No. 81-2015

In the Supreme Court of the United States

, Term

CHURCHILL AREA SCHOOL DISTRICT,
Petitioner

vs.

DOROTHY HOOTS, *et al.*,
GENERAL BRADDOCK AREA SCHOOL DISTRICT,
Respondents

Opposition of Respondent General Braddock Area School District to Grant of Leave to Pennsylvania School Boards Association to File Brief in Support of the Grant of a Writ of Certiorari

Anton W. Bigman
210 Fort Pitt Commons
445 Fort Pitt Boulevard
Pittsburgh, PA 15219
(412) 471-2644
Attorney for Respondent, General Braddock Area School District

Financial Press Corporation, Pittsburgh

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Opposition of Respondent General Braddock Area School District to Grant of Leave to Pennsylvania School Boards Association to File Brief in Support of the Grant of a Writ of Certiorari

Pursuant to Rule 36.3 of the Rules of the Supreme Court of the United States, Respondent, General Braddock Area School District, files the following Objections to Motion by Pennsylvania School Boards Association for leave to file brief as Amicus Curiae in support of the Grant of a Writ of Certiorari.

I.
INTEREST OF RESPONDENT OBJECTOR

Respondent, General Braddock Area School District, designated a defendant-intervenor, was the institutional victim of the intentional discrimination found by the District Court on May 15, 1973[1], and affirmed by the United States Court of

[1] *Hoots v. Commonwealth of Pennsylvania*, 359 F.Supp. 807 (W.D. Pa. 1973)

Appeals for the Third Circuit on February 1, 1982[2]. It was comprised of the former school districts of Braddock, North Braddock and Rankin, all of which were previously independent school districts prior to the commencement of the consolidation process in 1961, which was completed in 1971. The General Braddock Area School District and its Board of School Directors, as well as the former component school districts, were all members of the Pennsylvania School Boards Association.

II.
MOTION OF PENNSYLVANIA SCHOOL BOARDS ASSOCIATION

General Braddock Area School District strongly opposes any grant of leave to Pennsylvania School Boards Association (hereinafter PSBA) to file brief in support of the Petitions for the Writs of Certiorari and vigorously challenges its position and right as Amicus Curiae.

As stated in its Motion the PSBA is a non-profit corporation representing 501 local school districts (and their School Boards) of the Commonwealth of Pennsylvania. Among those school districts are Churchill Area, Edgewood, Swissvale Area and Turtle Creek Area, all Petitioners for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit in the within case.

As previously stated, Respondent Objector herein, General Braddock Area School District, is also a member of the PSBA as were its former component school districts.

The serious question that is raised is whether or not a non-profit corporation such as the PSBA has the right to pick and choose among its members in taking sides in a matter now before this Court. General Braddock Area School District

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[2] *Hoots v. Commonwealth of Pennsylvania*, 672 F.2d 1107 (1982)

contends that it does not. During the course of the violation which occurred throughout the reorganization process in the 1960's and throughout the entire litigation during the 1970's, the PSBA never expressed any views or interest nor had it petitioned to participate in the suit, yet, after 20 years of non-involvement the PSBA now desires to enter into an attack on the long standing violation finding and the relief granted by the District Court. The essence of the violation was the creation of General Braddock Area School District as a black district surrounded by white districts. PSBA is thus in the position of supporting the white districts against the black district and in so doing is in conflict with its duty to treat all School Boards in an equal manner.

There is obviously a conflict of interest since members of its Association are both petitioners and opponents. A non-profit corporation owes a duty to its constituent members akin to that of principal and agent, Rowley on Partnerships, §6.8, p. 89, vol. 1, 2nd Ed. (1960), and lacks authority to act where it does not have the consent of all of its principals, Sell, Agency, Sec. 133-134, pp. 120-122 (1975).

Lastly, PSBA in its Motion states:

> "The instant matter is of fundamental concern to the Pennsylvania School Boards Association as it involves the circumstances under which the Federal Judiciary can intervene in the affairs of local school districts and the degree of such intervention."

This is most curious. The Consolidation Statutes, of which there were three[3], were all self-terminating, thus, as of 1971, there were no further consolidations under the statutes in question nor are there any cases pending regarding the same

[3]Act of September 12, 1961, P.L. 1283 No. 561, 24 P.S. §2-281 *et seq.*, Act of August 8, 1963, P.L. 564, No. 299, 24 P.S. §2-290 *et seq.*, Act of July 8, 1968, P.L. 299 No. 150, 24 P.S. §2400.1 *et seq.*

except the within case. Therefore, the circumstances surrounding the consolidation process in Pennsylvania, which was unique, and the Constitutional ramifications thereof have no prospective value to PSBA. It is considered that the alleged "education" sought by PSBA is but a camouflage of its real purpose: to aid some member school districts of its Association against other member school districts of its Association.

CONCLUSION

Pennsylvania School Boards Association is attempting to represent one group of school districts in its membership against another group of school districts in its membership. This is a conflict of interest and why the Motion For Leave To File Brief should be denied.

Respectfully submitted,

ANTON W. BIGMAN
210 Fort Pitt Commons
445 Fort Pitt Boulevard
Pittsburgh, PA 15219
(412) 471-2644